(Testimony of James Anthony Allen.)

(All parties present as before, and the trial was resumed.)

Direct Examination
(Continued)

By Mr. Etter:

Q. At the close of the testimony, Mr. Allen, if you recall, [1152] we had been asking you about a meeting at Mr. Keane's home. You recall that?

A. Yes, I do.

Q. Now at this time, Mr. Allen, I should like to hand you Defendant's for identification P, Q, R and S, and ask you to examine those and tell me what they are?

A. P is a waiver of notice of meeting and consent to hold a directors' meeting and transact business of the Pilot Silver Lead on the 21st day of February, 1947. It's signed by F. C. Keane, Irene Vermillion, and Glynn D. Evans. The next one, S, is the resignation of Glynn D. Evans from the Pilot Silver Lead Mining Company. R is the resignation of Irene Vermillion from the Pilot. Q is the resignation of F. C. Keane, on the 21st of February.

Q. I'll ask you, Mr. Allen, were you present at the time these instruments were executed?

A. I don't believe I was in there when they actually signed them, but we were in, as I recall, at 2:30 in the afternoon. They had prepared those in the morning. We asked to see the resignations and the minutes, Mr. Grismer and myself, and he

(Testimony of James Anthony Allen.)

handed us those resignations, together with——

Q. And are these the resignations to which you refer? A. Those are the ones.

Q. And you saw them afterwards?

A. Yes, sir. [1153]

Q. And you recognize those signatures?

A. They are.

Q. And what were the circumstances surrounding that meeting?

A. Well, it was a culmination of attempting to have Mr. Keane make a disclosure of the affairs of those corporations.

Q. What events had preceded this meeting?

A. The trip down to his house sometime in the month of October; a conference with him at the time in the Davenport Hotel in connection with a note of the Independence, and several conferences in his office with Mr. Wayne, attorney at law, prior to that.

Q. Did you employ Mr. Wayne?

A. We did, yes.

Q. And what was done pursuant to your employment of Mr. Wayne prior to the execution of these instruments?

A. Several demands would be made on him by Mr. Wayne and ourselves, and he would always make an appointment and then fail to keep it, so we finally got to the point we said we'd call a stockholders' meeting and throw him out; he said we didn't have the stockholders' list, which was

(Testimony of James Anthony Allen.)

true, so we went to E. J. Gibson and got the list they had from the sale of treasury stock, also to Pennaluna and Company and got their list, and then confronted Mr. Keane with the list, and then he agreed to resign. [1154]

Q. What was said by him at the time of the resignations?

A. He asked if he could have about sixty days to get the bank balances in shape. We asked what was wrong with them. He said "Give me sixty days to get them in shape." Both Grismer and I agreed it would be all right, because we wanted to turn them over to Mr. Randall to have an audit anyway, but he did turn over the stock ledger, the seal of the company, and I think one or two files that might have had the articles of incorporation and so forth.

Q. Did you ever succeed in getting the bank ledger, checks, or otherwise, pursuant to this arrangement?

A. No, I never did. I made demands on him after that.

Q. And what was said by him?

A. He'd keep evading on that.

Q. And you never did get them?

A. I never did.

Mr. Etter: At this time I'd like to move that Defendant's P, Q, R and S be admitted in evidence.

Mr. Erickson: We have no objection to any of them.

(Testimony of James Anthony Allen.)

The Court: Let me see them. Exhibits P, Q, R and S admitted.

(Whereupon, Defendant's Exhibits P, Q, R and S for identification were admitted in evidence.)

Q. (By Mr. Etter): Do you know at this time in respect to attorney James A. Wayne of Wallace, Mr. Allen, do you know [1155] where he is?

A. Mr. Wayne is deceased.

Q. He is deceased?

A. He died sometime in August or September of 1947.

Q. Was any statement made by Mr. Keane at the meeting to which we've referred concerning any partnership agreement between you and he?

A. Never at any time either by Mr. Keane or Irene Vermillion.

Q. Was anybody else there?

A. Mr. McCann was there, Mr. Keane's law partner, who had been his partner since April of 1946.

Q. Did he make any such statement or claim?

A. Never made any such statement at all.

Q. I'll hand you Defendant's for identification N and O, and ask you if you recognize those, Mr. Allen?

A. Yes. O is the supplement agreement between the Lucky Friday Extension and the Big Friday. *D* is the original agreement between the Extension Company and the Big Friday.

(Testimony of James Anthony Allen.)

Q. Have you examined those before?

A. Yes, we have.

Q. And where did you secure those?

A. They were in the files when Mr. Grismer took the books and records of the Extension Company out of Mr. Keane's office.

The Clerk: I think you're mistaken on the original [1156] agreement; it should be defendant's N.

A. Oh, yes, N and O; N is the original, and O is the supplemental.

Mr. Etter: At this time I'd like to move that Defendant's N and O be admitted in evidence.

Mr. Erickson: We have no objection; I thought they had already been received in evidence.

The Court: Let me see them. Are copies already in evidence?

Mr. Etter: I don't believe so, your Honor. They were identified. Were they, Mr. Clerk?

The Clerk: I don't believe they are, your Honor.

The Court: Defendant's Exhibits N and O admitted.

(Whereupon, Defendant's Exhibits N and O for identification were admitted in evidence.)

(Whereupon, check and confirmation of sales of Clayton stock by Hogle and Co. to Keane were marked Defendant's Exhibit CC for identification.)

(Testimony of James Anthony Allen.)

Mr. Etter: Your Honor, at this time, if you will recall I was questioning Mr. Greene of J. A. Hogle and Company with reference to an account carried in Butte, Montana, by J. A. Hogle and Company. I have here now an exhibit marked Defendant's Exhibit CC for identification, and it is stipulated, I believe, between government counsel and defendant that the exhibit itself, being [1157] defendant's Exhibit CC, indicating a check to F. C. Keane, signed by J. A. Hogle and Company, and the billing on the same, may be admitted in evidence without further identification.

Mr. Erickson: That's correct.

The Court: Exhibit CC admitted, on stipulation of both sides.

(Whereupon, Defendant's Exhibit CC for identification was admitted in evidence.)

Q. (By Mr. Etter): Handing you Plaintiff's Exhibit No. 13, Mr. Allen, I'll ask you to examine that.

A. Well, that's a check to the Pilot Silver Lead Mines Company for $40,000 from E. J. Gibson and Company.

Q. I'll ask you when you first saw that check, Mr. Allen?

A. I'm quite positive it was in Mr. Erickson's office would be the first time that I actually had a good look at that check.

The Court: What exhibit is that?

Q. Plaintiff's Exhibit No. 13. I'll ask you, Mr.

(Testimony of James Anthony Allen.)

Allen, whether you ever delivered this to Mr. Keane? A. I did not.

Q. Handing you Plaintiff's identification 103, I'll ask you to examine that, Mr. Allen.

A. Well, this is a cashier's check payable to myself from the Old National Bank on October 15, 1945. It's endorsed by [1158] myself, and apparently was deposited in the Idaho First National Bank in Wallace, Idaho.

Q. Do you recall the circumstances surrounding this?

A. Yes. Mr. Keane asked me to pick up some money from Mr. Halin. Mr. Halin bought 200,000 shares of his stock. Mr. Halin gave me a $13,000 check, as I recall, and I thought there was $7,000 in cash, but it would have been $5,000. I am not sure on that point, but at any rate I went to the Old National Bank and got this cashier's check for the cash money; it apparently was $5,000 or I would have gotten it for the whole thing. I delivered the check to Mr. Keane in Wallace, Idaho, and I had a receipt for him to sign, that was in my brief case, and the brief case was in the office, so I didn't have it at the time.

Q. But you delivered it to Mr. Keane?

A. I delivered it to Mr. Keane, and I understand he deposited it to his account or to some account in the Idaho First National Bank.

The Court: That's what exhibit, 103?

Mr. Etter: It's not admitted yet, your Honor,

(Testimony of James Anthony Allen.)

but it's identified. At this time, your Honor, I'd like to move that Plaintiff's 103 be admitted in evidence.

Mr. Erickson: No objection.

The Court: Let me see it. Exhibit 103 admitted.

(Whereupon, Plaintiff's Exhibit No. 103 for identification was [1159] admitted in evidence.)

Q. (By Mr. Etter): Mr. Allen, you were here when Mrs. Vermillion was testifying?

A. I was.

Q. And you heard her say in substance and effect that you instructed her to issue certain stock certificates to you?

A. I've instructed Mrs. Vermillion to issue stock certificates to me from the Grismer stock after I had acquired it from Mr. Grismer.

Q. That is so?

A. That is so, on perhaps two or three occasions.

Q. Are those all the instructions for delivery of stock?

A. I've never given Mrs. Vermillion or anyone else an instruction to issue any of the treasury stock from the sale of this company.

Q. Did you ever either orally or in writing or otherwise authorize Mrs. Vermillion to sign your name on notes or checks?

A. Never at any time.

Q. Did you ever orally or in writing or other-

(Testimony of James Anthony Allen.)

wise authorize Mr. Keane to sign your name on notes or checks?

A. I certainly did not, never, at any time.

Q. Now you stated, I think, in your direct testimony that you owned 60 per cent of the stock in the Delaware Mines?

A. Yes; that may be a variance one way or another. [1160]

Q. Do you know offhand how much money of the Delaware Mines Corporation went into the Lexington or Montana Leasing in Montana?

A. Well, it would be difficult to state how much went in there, but there was approximately $70,000 that should have.

Q. That went out of Delaware?

A. That's right.

Q. As indicated by the exhibits?

A. That's right.

The Court: And should have gone in where?

Q. Montana Leasing, or the Lexington Silver Lead. I should like to hand you plaintiff, government's Exhibit 116, being titled "Sales by James Allen of Lucky Friday transferred certificate 14" and so forth, and ask you if you have examined that, Mr. Allen, or a copy of it?

A. Yes, I have.

Q. I'll ask you whether or not that's a substantial representation of sales of Lucky Friday Extension stock made by you?

A. That is; it's substantially correct.

(Testimony of James Anthony Allen.)

Q. I hand you Plaintiff's Exhibit 117, entitled "Sales by J. A. Allen of Pilot Silver Lead stock transferred from certificates number 13 for 280,000 shares and 14 for 320,000 shares" and so forth, and ask you if you have examined a copy of that?

A. I have, and it's substantially correct. [1161]

Q. It's a substantial representation of your sales of stock? A. Yes.

The Court: This is Pilot?

Q. Yes, your Honor. Handing you plaintiff's 114, I'll ask you whether or not that is a substantial representation of the stock transfer indicated thereon?

A. No, this is not. The first column here would be correct. The second column has nothing to do whatever with the sale through Hogle and Company.

Q. Of that stock?

A. This represents the sale of 30,000 shares of Johnston's stock to J. A. Hogle and Company in Butte through my name, and a check for $6,572.95 which is shown here.

Q. You examined that check?

A. I examined that check. That is not my signature on the check, and I never handled the check, and I never delivered any stock to Hogle and Company, have never had an account with Hogle and Company, and as indicated here, this is the only sale that went through Hogle and Company in my name.

(Testimony of James Anthony Allen.)

Q. What have you to say as to this first sale?

A. The 25,000, that was stock given to me by Mr. Keane in exchange for his right to purchase my option on the Delaware Mining stock of 500,000 shares from what is known as the Baumgartner stock.

Q. And pursuant to that, do you know whether Mr. Keane did [1162] purchase it?

A. He did.

Q. With respect to your sales, Mr. Allen, of the so-called vendor's stock in the Pilot Silver Lead Mines, when were the first sales of such stock that were made by you?

A. No sales were made by me of the Pilot stock until the latter part of July or in August of 1947.

Q. And that would be how many months after the original issue?

A. Somewhere in the neighborhood of 14 to 15 months.

Q. 14 to 15 months. With regard to the vendor's stock of the Lucky Friday Extension, when were any sales made by you?

A. The first sales would be over a year, sometime in July, about July 7, July 8.

Q. With respect to the sale of the stocks to which you've referred, Mr. Allen, were any of those stocks sold at the time or within a short time after the original issue to the public?

A. Of the vendor's stock you just spoke of?

Q. Yes.

(Testimony of James Anthony Allen.)

A. No. They were both instances over a year, or a year at least.

Q. Was any of the stock owned by you, I mean any of this vendor's stock of Lucky Friday Extension, sold by you at the time of the second issue of Lucky Friday Extension, when the market price was thirty two and a half cents a [1163] share?

A. No, not a share.

Q. And was any stock of Pilot at all sold by you, Mr. Allen, at the time of the original issue or shortly thereafter of Pilot stock, when it was ten or twelve and a half cents a share?

A. Not a share.

Q. And have you examined the exhibits to which I have directed your attention, and your own accounts, to determine what the average price of any stock sold by you in Lucky Friday Extension was, Mr. Allen?

A. On the exhibits just referred to, the average would appear there in 1947 at around ten cents.

Q. That's of Lucky Friday Extension?

A. That's of Lucky Friday Extension. My records show on through 1948 it would be closer to eight cents, for the average.

Q. What was the average price of all the stocks so far as the Pilot Silver Lead Mines, that was sold by you, Mr. Allen?

A. It would be three cents, just about.

Q. Was there any reason that you had for selling the vendor's stock that you had in both of these companies over a year after the original issue?

(Testimony of James Anthony Allen.)

A. Well, it was my understanding that if the stock was held for a year, that that would be in compliance with the [1164] S. E. C. regulations.

Q. And you therefore didn't sell any of that stock until that time? A. I did not.

(Whereupon, report of expenditures and income for 1945 of Montana Leasing was marked Defendant's Exhibit DD for identification.)

Q. Handing you Defendant's Exhibit DD for identification, I'll ask you to examine that and tell us what it is.

A. Well, this is a recap of the monthly operations of the mine at Neihart, Montana, of the Lexington Silver Lead Mines, prepared by John P. Quinn and myself from the daily records posted in the various books at the mine, showing the yearly summary by month, and the distribution of the various departments or accounts to which the charges would be made.

Q. And when was that prepared by you and Mr. Quinn?

A. I would say that both of these were prepared about in January or February of 1947.

Q. That one of 1945?

A. This perhaps would be in 1946.

Q. And did you prepare such statements during each year that you were associated with the Lexington or Montana Leasing? A. Yes.

Q. In your position, and supervising it? [1165]

A. Yes.

(Testimony of James Anthony Allen.)

Q. And these figures are yours and Mr. Quinn's, made at that time?

A. Well, they're Mr. Quinn's figures; they're not my figures.

Q. Now, are those the figures from which you secured the summaries you were using yesterday to refresh your recollection from?

A. Yes, they were transposed from records here. Now, I might say, I wouldn't swear that this was made soon after the year 1945, but a portion of it would be, so that it would be all brought up together in 1947, and that would be taken from the records that would be posted daily.

Q. Daily records?

A. Daily records at the mine.

Q. And was that part of your supervisory position, Mr. Allen?

A. It would be, yes.

(Whereupon, report of expenditures and income for 1946 of Montana Leasing was marked Defendant's Exhibit EE for identification.)

Q. At this time, Mr. Allen, I'll hand you Defendant's EE for identification, and ask you to examine it and tell me what it is?

A. This is also a recap of the operations for '46, made in '47, with Mr. Quinn's figures showing the monthly distribution of the expenses and the charge to the various [1166] departments.

Q. Both of these exhibits DD and EE are made during the course of the business of the Montana

(Testimony of James Anthony Allen.)

Leasing or the Lexington Silver Lead Mines?

A. They would be, and the figures reflected here would be posted daily in other ledgers.

Q. I see, and the book from which you were refreshing your recollection yesterday contains the figures on here, Mr. Allen?

A. It's transposed from there to this record, yes.

Q. By whom?

A. By myself and Mr. Smith, who was then in the office.

Mr. Erickson: I'd like to ask a question on voir dire.

Voir Dire Examination

By Mr. Erickson:

Q. On Identification DD, referring to the month of November, 1945, it shows there "Production, $1905.19." Then I'll refer you to Plaintiff's Exhibit 118—or rather, I'll use Plaintiff's Exhibit 9-a, and referring to a deposit to the credit of Montana Leasing in the Idaho First National Bank, if you do not get $2,253.95 for that month, and your report only shows $1900.00?

A. There's apparently two checks from the smelter.

Q. One for $1676.00, and one for $557.50.

A. Well, oftentimes the records here would indicate a calculation [1167] of the concentrates during that month; that necessarily wouldn't reflect the cash income from the smelter.

(Testimony of James Anthony Allen.)

Q. Well, this was an actual bank deposit, was it not?

A. That's right. Now, there could be a carry-over, and I believe if you had the smelter checks they would show. The manner in payment of the smelter, when the bill of lading reaches the smelter, why, they advance 80 per cent on the estimate of the assays. It might take ten to fifteen days for the smelter to run their assays, so that at all times there might be a balance of a certain percentage of the last shipment due from the smelter, that might come in at the same time, or later, or earlier.

Q. Well, your figure here is incorrect, then, of $1905.19?

A. No, I wouldn't say that it is incorrect, because the bank deposit would not truly reflect the concentrates as estimated at the mine by the engineer on hand for this month.

Q. Well, how do you explain your deposit shows you deposited $2,253.95 in the Montana Leasing bank account in November, 1945, and your schedule only shows $1905.00?

A. Well, we might have had a carry-over from September, and I might add, Mr. Erickson, that as far as the smelter checks or any deposits, or the administration of any of the bank accounts from the Idaho First National Bank, I wouldn't be in a position to state, because that was not within my province. [1168]

Q. Did you check those schedules yourself?

A. I have checked them, yes.

(Testimony of James Anthony Allen.)

Q. Did you go into all the checks, the receipts, and the payments, and disbursements, and deposit slips, to check them yourself?

A. No. You could not. These records are taken from the checks written at the mine, and the stubs of the checks there, which when the payroll checks would be cashed, they would go to the Idaho First National Bank, the bank statements would come to Mr. Keane's office. He was supposedly keeping ledgers up there for that purpose. The mine keeps this for the records from the various departments.

Q. So that those schedules are not complete?

A. They're complete as to mine records.

Q. They're complete as far as they go, but they do not intend or are not intended to be a full statement of the financial affairs of the Lexington Mining Company for 1945 and 1946?

A. That's right, they're not, and I qualified that yesterday. They are as far as the department of the mine is concerned.

Mr. Erickson: We have no objections to them being admitted for what the witness says they are.

The Court: Exhibits DD and EE are offered?

Mr. Etter: Yes, they are, your Honor.

The Court: Let me see them. Admitted; no objection. [1169]

(Whereupon Defendant's Exhibits DD and EE for identification were admitted in evidence.)

(Testimony of James Anthony Allen.)

Direct Examination—(Continued)

By Mr. Etter:

Mr. Allen, did you at any time aid, assist, or participate in the making of any annual reports of the Pilot Silver Mines Company?

A. Never at any time.

Q. That is in 1945 and 1946?

A. Yes, and the only reports in '47 and '48 would merely be tax reports, and no financial reports.

Q. I see; did you participate in any way or fashion or assist in the preparation of the annual report which is in the evidence in this case——

A. Never at any time.

Q. ——for the Pilot Silver Lead Mines?

A. No, never did.

Q. All right. Now, you were in court when Mrs. Herrick testified, Mr. Allen?

A. Mr. Herrick, you mean.

Q. Mr. Herrick, excuse me.

A. Yes, I was.

Q. What have you to say as to Mr. Herrick's testimony?

A. I'd say that his testimony is substantially correct.

Q. In what respects?

A. That I did talk with Mr. Herrick and Mrs. Phelan after— [1170] just before the time the purchase of the claims was consummated, but at no

(Testimony of James Anthony Allen.)

time did I direct Mr. Grismer to go see them about it.

Q. Now, you were here when Mrs. Phelan testified? A. I was.

Q. What have you to say as to hers?

A. Mrs. Phelan is correct. Mr. Grismer asked me to go down to her house with him to explain the central development plan. The Phelan claims border just north of the Gold Hunter, and which I did, and I believe there was some discussion as to the price; I asked her what Mr. Grismer was paying her for them, and she said some figure, and I said if they're worth anything they're worth twice that amount.

Q. So her testimony was substantially correct?

A. Yes.

Q. Now, with respect to a civil injunction which is here in the evidence and filed by the government, obtained, as I understand it, Mr. Allen, in what year, if you recall? A. 1943.

Q. And do you recall from examination of this exhibit, plaintiff's 121, a photostat, I'll have you examine that a minute, and ask you if you recall that? A. Yes, I do.

Q. And what was the situation at that time with respect to [1171] any limitation on you in stock transactions?

A. Absolutely none at that time.

Q. Was there later?

A. I have been advised that later, six to seven

(Testimony of James Anthony Allen.)

months later that the Securities Act was amended or supplemented with an additional law that did have a prohibition in it with respect to a consent decree, which that was, that would prevent being connected with promotion directly for a period of three years.

Q. Now, did you talk with Elmer Johnston, the attorney, the mining attorney, who testified here early, about that particular injunction?

A. I did.

Q. And what purpose did you have at that time, Mr. Allen? A. It was for the Gold Hunter.

Q. That's when you were——

A. ——negotiating for the Gold Hunter Mine.

Q. With the people that you discussed the other day? A. That's right.

Q. And that was the time that you had the conversation?

A. That's right, and it resolved then it was just merely an inquiry, that even under that injunction, if the offering would have been, which it would, have exceeded $300,000, there would have been no prohibition on me as far as a different section of the Act; that only applied to just [1172] one section of the Securities Act, as I understand it.

Q. I see. Now, regardless of the effect of that civil injunction, when would it have expired so far as any restriction contained therein?

A. Well, with respect to the Pilot——

Q. No; when would this have expired?

(Testimony of James Anthony Allen.)

A. It would have expired on June 4, 1946.

Q. 1946; and when was the—wasn't the original issue of Pilot on or about the 22nd day of May?

A. That's my understanding, on May 22.

Q. So that in twelve days from the original issue of Pilot——

The Court: What date did you say?

Q. The original issue of Pilot, May 22, 1946.

The Court: What was the date of the injunction?

Q. The 4th day of June of 1943. The issue of Pilot, then, occurred only twelve days before this injunction would have had no force or effect on any activities of yours other than provided by the statute? A. That's exactly right.

Q. Now, you've talked about the sale and transfer of stock of Mr. Grismer's. You were here when he testified, Mr. Allen? A. Yes, I was.

Q. And did you hear him state that he had such an arrangement with you? [1173]

A. Yes, he did.

Q. Now, pursuant to that, have you transferred over a period of years certain stocks to Mr. Grismer?

A. I have, over 700,000 shares in various companies.

Q. Tell us approximately what those companies were——

A. The Hunter Silver Lead——

Q. ——and the respective shares.

(Testimony of James Anthony Allen.)

A. ——100,000 shares; the Alma, 100,000 shares; the Hibernia, 100,000 shares; Lexington Silver Lead, 100,000 shares; Coeur d'Alene, 100,000 shares; and Pilot Silver Lead, for which he had loaned me some stock earlier, and when I acquired Pilot in October, 1948, 250,000 shares of Pilot Silver Lead that I repaid him.

Q. Now, you have discussed this central development program at considerable length. Have those negotiations continued through the past several years?

A. They have; they've continued right along; they're continuing right at this present time.

Q. And who are you now negotiating with, Mr. Allen?

A. With the Day Mines of Wallace, Idaho.

Mr. Erickson: To which we object as incompetent, what he's doing at this time, more than a year after the indictment.

The Court: Well, I'll overrule the objection. It will be for the jury to determine whether the actions of [1174] the defendant after the indictment has been returned give any substantial assistance to the jury in determining what his actions were before he was indicted.

Q. (By Mr. Etter): All right, I'll ask you whether any negotiations were in progress, Mr. Allen, prior to the return of this indictment?

A. Yes, they were.

Q. And who were they with?

(Testimony of James Anthony Allen.)

A. With the Day Mines.

Q. What individuals? A. Mr. Rothrock.

Q. And who else? A. Mr. Lawrence Day.

Q. Will you state what the Day Mines are?

A. Well, that's one of the largest mining companies in the Coeur d'Alenes.

Q. I will ask you specifically, I might have made a mistake, Mr. Allen, did you have anything to do or participate in the preparation or otherwise of the statutory statement by Lucky Friday Extension Company with the State of Washington, being Defendant's Exhibit A?

A. I have never seen—never had anything to do with it, and never saw the statutory statement until sometime in 1947 or 1948 when Mr. Elmer Johnston showed me a copy of it that he had in his office.

Mr. Etter: That's all, your Honor.

The Court: All right.

Cross-Examination

By Mr. Erickson:

Q. Mr. Allen, what is your occupation at the present time? A. In the mining business.

Q. Are you an engineer?

A. No, I'm not.

Q. Are you an accountant?

A. No, I'm not.

Q. Now, you are a graduate of a law school, are you not?

A. I've had a course in law, I've never practiced law.

(Testimony of James Anthony Allen.)

Q. You are a graduate of a law school, are you not?

A. I am, of Cumberland University, yes, sir.

Q. You hold a degree in law?

A. That's right.

Q. You were associated with Mr. Towles in his office as a lawyer or in some capacity for a number of years, were you not?

A. Associate only to the respect of the mining companies, in mining only.

Q. You are quite familiar with the organization and the incorporation or promotion of mining companies?

A. No, indeed I wasn't. At the time I was in Mr. Towles' office was the beginning of the Callahan Company, the Callahan Consolidated, which I took active charge of the [1176] operations in connection with it, and also the Lexington Mining Company, that was in Mr. Towles' office, which was then the Montana Silver Queen Mining Company.

Q. How many years did you spend in Mr. Towles' office? A. About four years.

Q. Mr. Towles practices mining law, does he not? A. That's right.

Q. And during the four years you were in his office you were engaged in assisting Mr. Towles with mining cases and mining organization?

A. I have never assisted Mr. Towles with a mining corporation while I was in his office. His work

(Testimony of James Anthony Allen.)

was mostly to the patenting of mining claims.

Q. Now, when did you first become active in the Lexington Silver Lead Mines in Montana?

A. In 1938.

Q. And in what capacity was that?

A. Oh, I believe it was 1938, 1939, as the vice president in charge of operations.

Q. And how long did you continue at that time?

A. To the Lexington?

Q. Yes, in the Lexington.

A. Up to and including 1942 and the first half of '43.

Q. Did you leave the Lexington at that time?

A. Did I leave it? [1177]

Q. Yes. A. No.

Q. Well, you say you were in charge up there until that time? A. That's right.

Q. What happened then?

A. Then Mr. Keane took a lease on the Lexington plant for the purpose of running dumps on the Ripple, Lexington, and Benton group of claims, on June 26, 1943. I was not active in the Montana Leasing Company until sometime in 1944, and I remained on as a director, and still am, of the Lexington Mining Company, together with Judge McNaughton and D. A. Callahan, of Wallace, Idaho.

Q. Did you say that you and the defendant Keane were going to incorporate the Montana Leasing Company?

(Testimony of James Anthony Allen.)

A. Did you say that we were going to?

Q. Yes.

A. He did incorporate it. He said he was going to.

Q. But to your own knowledge you never knew whether he completed the corporation or not?

A. He most certainly did.

Q. Did he have a directors' meeting, and by-laws approved?

A. I saw the minutes to where he had, yes, but I was not a director of it.

Q. You were not an incorporator or director?

A. I was not. [1178]

Q. Who were the incorporators?

A. I believe Sherman Smith, an attorney at law of Helena, and two others of Helena were the incorporators, whom I don't know, then the incorporators elected Mr. Keane, Mr. Mullen and Mr. Smith as the directors.

Q. What was your capacity with the company, with the Lexington, at that time after the articles of incorporation were drafted by Keane?

A. Well, now, are you referring to the Lexington Mining, or the Montana Leasing?

Q. To the Montana Leasing, or whatever you call it.

A. Well, there's two distinct separate companies; there's the Lexington Mining Company and the Montana Leasing Company. I was a director and vice president of the Lexington Mining Com-

(Testimony of James Anthony Allen.)

pany. I had no official position and was not a director and was not active and had nothing to do with the management of the Montana Leasing Company in '43 or part of '44.

Q. As I understand, there was the old Lexington Company, which you were a director in?

A. That's right.

Q. And then there's the Montana Leasing Company, created by Keane——

A. That's right.

Q. ——which you say is a corporation and which he incorporated, [1179] and you had nothing to do with the Montana Leasing Company?

A. In the part of '43 or the early part of 1944, no.

Q. And how did you come to have something to do with the Montana Leasing Company then?

A. How did I what?

Q. How did you happen to become involved or interested in the Montana Leasing Company?

A. In 1944, when the contracts for the Benton and the Ripple were secured by Mr. Keane, the Lexington Silver Lead Corporation was to be formed, and was formed, at least he has told me that, for the purpose of taking over what interest the Montana Leasing Company held on the Lexington property, the contracts on the Benton group, the contracts on the Ripple group, and the investments of Independence and the Delaware into the Montana Leasing.

Q. And what capacity did you serve in the Mon-

(Testimony of James Anthony Allen.)

tana Leasing Company in 1944, when you entered the company?

A. I didn't serve as any director in it.

Q. Well, what were you, what was your position?

A. Well, it was the Lexington Silver Lead, it was carrying on as the Lexington Silver Lead, supposed to, at that time, and Mr. Keane was always to finish the articles of incorporation or to complete the corporation part of it.

Q. Well, were you employed by the corporation? [1180]

A. Was I employed by the corporation?

Q. By the Montana Leasing Company, the corporation that Keane set up; were you employed by that company?

A. No, but I had an interest, the Delaware Mines Company had an interest in the Montana Leasing Company, but I had no active part in the management.

Q. Who was the manager?

A. Keane and William Mullen, Sr. I believe Mullen Sr. was the active manager.

Q. And what was your position, then, in the property there, the Montana Leasing Company property; what was your position?

A. My interest in the Lexington.

Q. Yes, but what were you doing there on the property? You say you were not a manager; what were you?

A. Doing on the property?

(Testimony of James Anthony Allen.)

Q. Yes.

A. Well, I don't know that I was at the Lexington property in 1943. I might have been, but to go to the property wouldn't necessarily——

Q. Well, what work did you do there after 1943 on the Montana Leasing property there?

A. I made periodic trips to Montana in connection with the development of the mining operations.

Q. Well, you were issuing a number of checks on the Montana [1181] Leasing Company. You were there in Montana at the time you were writing those checks, were you not?

A. I think that was in 1944, was it not?

Q. Well, I'm asking you if later, in 1944, you were there working? A. Yes.

Q. Were you in charge of operations at that time? A. Yes, I was.

Q. And who put you in charge of operations up there, or gave you that job?

A. Well, it would be the directors of the Lexington Silver Lead, which at that time were Keane and Mullen.

Q. When was the Lexington Silver Lead formed?

A. The articles of incorporation were to be drawn, and I believe were, in 1944, but according to the record, Keane did not file them of record until '45.

Q. So that we're not confused, there's the Montana Leasing Company, a corporation which was

(Testimony of James Anthony Allen.)

formed by Keane, is that correct, and then the Lexington Silver Lead Mines embodied the same property and the same corporation as the Montana Leasing, also formed by Keane?

A. It would be the same properties.

Q. But it was a different corporate set-up?

A. That's right.

Q. What was the difference in the corporate set-up between [1182] the new Lexington Silver Lead Mines and the Montana Leasing Company?

A. Well, in the first place it was an Idaho corporation as against the Montana Leasing being a Montana corporation; the capitalization was three and a half million shares as against I believe a million shares of Montana Leasing; I'm not sure as to what the capitalization of Montana Leasing was.

Q. Well, the Lexington was the successor to the Montana Leasing Company, was it not?

A. That's right, in 1944.

Q. Were you an officer or incorporator of the Lexington Silver Lead Mines?

A. I don't believe I was.

Q. Did you continue working there at the property at Neihart, Montana, for the Lexington Silver Lead Mines? A. Yes.

Q. In the same capacity as you did for the Montana Leasing, as manager?

A. I didn't manage in the Montana Leasing until beginning in 1944.

Q. Well, after——

(Testimony of James Anthony Allen.)

A. We were all interested, as the Lexington Company, that the operation of the Montana Leasing would be profitable.

Q. But you were in charge of operations there, or superintendent, [1183] or whatever you call yourself, from 1944 to what date?

A. I still am, right to date.

Q. And during that time you were issuing the checks for the work, the labor, the materials, and the operations there, were you not?

A. No. Oh, occasionally, yes, and I've written several checks. The manager at the mine usually wrote the payroll checks most of the time.

Q. During that time you state that you didn't see any of the bank accounts or deposits, or were acquainted with how the Montana Leasing Company or the Lexington Silver Lead Mines were receiving their money, or the status of their bank account?

A. I didn't say that I didn't know the source of the money. I said that the Independence and the Delaware were putting in the money, together with some personal money, but I never had any occasion to question Mr. Keane's integrity or as to his manner of handling the bank accounts when they'd get into his office.

Q. You never did see any bank statements or bank accounts of this Montana Leasing Company or Lexington Silver Lead?

A. I wouldn't say I never saw any; I perhaps

(Testimony of James Anthony Allen.)

have, but as to any particular or specific one, I couldn't say definitely.

Q. Although you were making deposits to and writing checks [1184] in the amount of thousands of dollars—— A. That's right.

Q. ——you never did see any of the bank statements or cancelled checks?

A. I didn't say that. I say that I perhaps did, but I never had any question, any real suspicion at the time to question the manner in which Mr. Keane was handling the bank accounts.

Q. Well, you knew he was drinking at this time, didn't you?

A. Oh, not any more than he is right now, or any more than Mr. Horning is drinking, or Mr. Jones. If Mr. Keane was an incompetent during that time it was deceptive to Mr. Hull, the attorney for the Marquart-Kingsbury lawsuit that settled with him in June, 1946, Mr. Horning, Mr. Jones, and all of them, as well as it was to me.

The Court: I think this is a good time for a recess.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Cross-Examination
(Continued)

By Mr. Erickson:

Q. Mr. Allen, you have seen Plaintiff's Exhibit

(Testimony of James Anthony Allen.)

120, which purports to be a list of Montana Leasing Company and Lexington Silver Mines, Inc., checks signed by J. A. Allen; you've seen that list? [1185]

A. I have, yes.

Q. Over a period beginning July, 1945, and ending in August, 1946, that's a period of 14 months, I believe; is that correct, you've seen that list?

A. I have. I just received it here about three or four days ago.

Q. Is that list substantially correct?

A. I would say it would be, yes.

Q. There are a number of checks in there for your personal living expenses, and to cash?

A. That's right.

Q. And there's some in there for gambling?

A. There's no gambling checks in there.

Q. Well, I'll refer you to one here for cash in the sum of $2,890.30, dated March 31, 1946. Does that refresh your recollection?

A. Yes, it does, very well.

Q. What was that check for?

A. That check was for cash at the Rocky Mountain Cafe in Meaderville, Montana, where you'll find several other checks both prior to this and after this, where on trips to Neihart I would take cash, oftentimes give a check for it, oftentimes not even give a check until after I came back, for the purpose of cashing payrolls, not that I would cash them myself, but the store man at the store, [1186] which is sixty miles from a bank, on paydays there

(Testimony of James Anthony Allen.)

would perhaps be ten or fifteen thousand dollars worth of payroll checks; our superintendent used to loan the storeman cash for two or three days intervals, sometimes a week, until he would get his checks cashed in Great Falls at the bank and then return it.

Q. As a matter of fact, gambling is conducted in that restaurant?

A. Mostly a fine restaurant, and I think which is internationally known, and I have known the owner since I was a boy ten years old.

Q. Well, there's gambling conducted in the back room?

A. There is in practically every place in Montana.

Q. Now, on September 10, 1945, there are two $100.00 checks for cash. Do those represent checks for gambling? A. No.

Q. Then on October 3 and 4, there is, October 3, one $100.00, cash, and then on October 4 there's four $100.00 cash checks and two $250.00 cash checks and one $70.00 cash check. That money was for—was any of that for gambling?

A. I loaned that to a party in Wallace, and if you will look at the deposit, you will find that it was a thousand dollars. You will find a deposit of a thousand dollars the following day, by which he repaid.

Q. Why did you have to write it in so many different checks? [1187]

(Testimony of James Anthony Allen.)

A. That was his request.

Q. And it totals $1070.00, I believe.

A. Perhaps the $70.00 would be mine, Mr. Erickson, but not for gambling.

Q. And then on October 23 there's a check for $200.00 in cash, and on October 28 a check for $700.00 in cash. A. In what year is that?

Q. That's in 1945. Is any of that for gambling?

A. No, it is not.

Q. Then on November 1, 1945, there's a $1,000 cash and on November 3 there's one for $100.00 and one for $500.00 cash. Are any of those for gambling? A. No, they would not be.

Q. In March, 1946, there's a $100.00 check to the Stevens Hotel, March 13, followed by a $33.92, $100.00, $118.04, $100.00, and $86.22. What are those for?

A. That would be for traveling and hotel expenses in Chicago.

Q. Those are Chicago, at the Stevens Hotel in Chicago?

A. The Stevens Hotel in Chicago.

Q. Then in May, 1946, there's a $1,000 check to Elmer Johnston, that's the Elmer Johnston that testified? A. That is right.

Q. And what was that for?

A. If my memory serves me correctly, Mr. Keane asked me to pay that to Mr. Johnston, and on several occasions I have [1188] paid out checks to Mr. Lakes at Mr. Keane's request, and that he would

(Testimony of James Anthony Allen.)

make the—I personally paid to Mr. Johnston, I think there's a $200.00 check here payable to Mr. Johnston that I have charged to mining, that was a donation to the Catholic Lay Committee, for which he was head, and I solicited some money for him from my friends.

Q. These checks do contain your living expenses, grocery bills, and insurance premiums?

A. Some of them. The insurance premiums amount to about $900.00 to a thousand dollars, which is charged to my personal account, should have been.

(Whereupon, a group of checks from Plaintiff's Exhibit 8-e for identification was marked Plaintiff's Exhibit 8-e-1 for identification.)

Q. Mr. Allen, I'll hand you Plaintiff's identification 8-e-1, the checks for cash totalling $1070.00, on October 4, 1945, and ask you if that's your signature on those? A. That is.

Q. Those are the checks you referred to that were loaned to a friend?

A. That is right, for which the deposit for a thousand dollars was made the following day.

Q. These are endorsed "Brownie's Corner, by M. P. Savage, Manager" all of them, is that correct? [1189]

A. Let's see; I didn't look at them; that is right.

Q. No friend's name appears upon the endorsement? A. That's right.

Mr. Erickson: I offer them.

Mr. Etter: No objection.

(Testimony of James Anthony Allen.)

The Court: Let me see that. Admitted.

(Whereupon, Plaintiff's Exhibit No. 8-e-1 for identification was admitted in evidence.)

Q. (By Mr. Erickson): I hand you Plaintiff's identification 8-i-2, and ask you to state if those are not Montana Leasing Company checks signed by yourself, cashed at the Metals Bar in Wallace, Idaho?

A. Well, it has the North Idaho sales, which is Mr. McFee, Metals Bar, and his endorsement.

Q. Well, he runs the Metals Bar, doesn't he, Mr. McFee?

A. No, Mr. Bob McDonald runs it. I believe Mr. McFee——

Q. Owns the building?

A. ——owns the building; he owns the Samuels Hotel.

Q. One check for $25.00, $75.00, $100.00, $30.00, and one for $50.00, is that correct?

A. I've cashed over a period of years many checks in the Metals Bar for cash.

Q. These were in a two-day period, is that correct?

A. Let's see, I didn't notice that.

Q. February 11 and 12, 1946, is that correct?

A. That's right.

Mr. Erickson: I offer it.

Mr. Etter: No objection.

Q. (By Mr. Erickson): Now, Mr. Allen, did

(Testimony of James Anthony Allen.)

the Delaware Mines advance anything to the Montana Leasing or Lexington Silver Lead account?

A. Did they?

Q. Did they?

A. All those deposits would have been made from Mr. Keane's office, I believe, from the smelter return checks that would come and would be deposited from his office.

The Court: Exhibit 8-i-2 admitted; you may proceed.

Q. Did you know or did you ascertain what amount the Delaware Mines was advancing to the Montana Leasing or the Lexington Silver Lead?

A. Well, they should have been advancing all of it.

Q. Well, will you answer my question? Did you make any effort to ascertain what amount the Delaware Mines was advancing or had advanced at any time?

A. At what period, at what time?

Q. Well, during any of this time before the indictment was returned did you investigate——

The Clerk: May I interrupt you a second? Your Honor, this last exhibit should have been 8-i-3.

The Court: What has been called 8-i-2 for identification, [1191] consisting of several checks drawn to cash, are admitted as exhibit 8-i-3. You may proceed. You may read the last question to the witness.

(Testimony of James Anthony Allen.)

(Whereupon, the reporter read the last previous question.)

A. Before the indictment was returned? Yes.

Q. When did you ascertain what amount the Delaware Mines Company had advanced to the Montana Leasing or Lexington Silver Lead?

A. The only way we had of determining that in the absence of never having had the records, the bank deposits of the Montana Leasing, would be taking it from the smelter checks that would have been paid in on the royalty, and in turn went to Keane's office to be deposited.

Q. Well, now, is it your contention that Keane kept the records of the Delaware Mines in his office, and they were not available to you for inspection? A. That they were not?

Q. Yes.

A. They would have been available to me for inspection had I had any suspicion as to what he was doing.

Q. Although you owned 60 per cent of the stock in the Delaware Mines you were not interested enough to go to Keane's office and look at the state of the accounts, then?

A. Well, I trusted Mr. Keane implicitly, and Mr. Keane's [1192] investment of the Independence was so far exceeding that of the Delaware that I felt that he at all times——

Q. Well, did you ask Mr. Keane where the

(Testimony of James Anthony Allen.)

money was coming from that went into Montana Leasing?

A. Why, it was understood from the Independence.

Q. Did he show you a statement how much was coming from the Independence?

A. No. I have asked several times to get up an audit on all the companies so that it could be completed, but he would always ask to wait until he finised the Kingsbury-Marquart litigation.

Q. Well, didn't you get suspicious when he was stalling you off on giving you a financial report?

A. Not until sometime in 1946.

Q. So that your suspicions didn't arise, then, from 1944 to 1946, a period of two years in which you were being stalled, you never even got suspicious? A. No, I did not.

Q. You received some of the Independence money yourself, that went into your personal account, didn't you?

A. For the Montana Leasing, and to Mr. Keane, you bet. That was the way Mr. Keane wanted it.

(Whereupon, Independence checks to Allen were marked Plaintiff's Exhibit No. 125 for identification.) [1193]

Q. I hand you Plaintiff's identification 125, which purports to be checks signed by F. C. Keane payable to J. A. Allen, on the Independence Lead Mining Company, and ask you if they do not total over $32,000?

(Testimony of James Anthony Allen.)

A. If I may, in answer to this, Mr.——

Q. Well, just answer the question——

A. ——get my records on that.

Q. ——and then you can explain. Is L the one you want?

A. No, what I wanted was a green book of the Montana, a record like this, showing my disbursements.

Q. I don't know where it is.

The Court: Well, gentlemen, you may proceed. There was a question asked him. Would you read the question?

A. Yes, I admit receiving these, and will show that money going right to Mr. Keane and the Montana Leasing Company.

Q. Well, why did Mr. Keane issue the checks to you if the money went right back to the Montana Leasing Company? Why didn't Mr. Keane issue the checks to the Montana Leasing Company?

A. If you will look at those checks, Mr. Erickson, you will find some are issued, January 2, $2500.00, of 1943, and you'll see checks subsequent to that up to June, which were loans to the Lexington Mining Company, for which the Independence Lead Mines had a mortgage to secure such [1194] loans. At times the Independence was advancing for payrolls of the Lexington, for which the money was available, but it would be repaid to the Independence, to Mr. Keane personally, and which was the way he asked the corporation to do it, and

(Testimony of James Anthony Allen.)

for which he asked the corporation, or Callahan Consolidated and the Lexington, to put the mortgages that were held by the Independence in his personal name. Here's total checks paid back to Mr. Keane at that time, $29,408.88. I will produce the checks this afternoon if you so desire.

Q. So this, then, was the arrangement conducted by you at Keane's request, then?

A. The arrangement conducted by me?

Q. Well, yes, you agreed to this arrangement by Keane, the checks were made by Keane, Independence Lead Mining Company president, to you personally, and you agreed to that arrangement?

A. I don't quite understand your question.

Q. Well, you agreed to accept the checks and endorse them and deposit them in the Montana Leasing account?

A. Well, you'll find that the checks going on beyond that were—may I see them again, please? There was some reason in the beginning in connection with the retirement of the notes of the Lexington Mine on the Callahan mill that was paid to Sherm Smith. Mr. Keane brought it to me [1195] in cash, and some of those checks constitute that.

Q. Did you ever ask Keane why he didn't pay it to the Montana Leasing Company directly instead of running it through your name?

A. We relied on the arrangements he wanted, and we had no right, no authority, to question his authority for doing it, nor his intention of what it was.

(Testimony of James Anthony Allen.)

(Whereupon, check from Independence to Sherman W. Smith, 3/31/43, was marked Plaintiff's Exhibit No. 126 for identification.)

Q. I refer you to Plaintiff's identification 126, and ask you to state if it was not a check paid by Mr. Keane directly to Sherm Smith, by Keane?

A. That's right, plus about $6,000 in cash, or $4,000 in cash, as I recall.

Q. So that check does not comprise the entire loan, then?

A. I am not sure of that, Mr. Erickson. I know that the loan was much more than that.

Mr. Erickson: I offer 125 and 126.

Mr. Etter: I'm going to object to these exhibits on the ground that they're incompetent, irrelevant and immaterial, and because of the fact that objection was sustained on behalf of the government made yesterday to the examination of Mr. Denney concerning his examination at this time into Independence, and his answer that what [1196] he did was merely cursory, and indicating, as they do, a movement of the government through its cross-examination to go into those same things upon which they objected and were sustained yesterday. Otherwise I'd have no objection.

Mr. Erickson: I might state for the record these are the same checks referred to in Defendant's Exhibit L, which is already admitted in evidence by the defendant. There's a sheet in Defendant's L.

The Court: Is that right, Mr. Etter?

(Testimony of James Anthony Allen.)

Mr. Etter: If I see it. I'm not sure. There's a breakdown of checks attached here for '43, but I will state here and now, your Honor, that I expected, and I didn't examine this, that I expected that the only payments by check that we discussed yesterday in this exhibit were payments in 1945.

The Court: Let me see the exhibits. Will you point out the checks on this exhibit that you say are referred to?

Mr. Erickson: Yes, the checks begining with January 6, 1943, payable to James A. Allen in the amount of $2500.00; these checks are the checks which I have offered there.

The Court: Let me see it.

Mr. Erickson: That page and the page after that.

The Court: Objection overruled. The ruling the [1197] Court made as to Mr. Denney was correct. Mr. Denney's direct examination was such that the question asked of him was not proper on cross-examination. Mr. Denney is not on trial in this case. The ruling of the Court as to Exhibits 125 and 126 are based upon the record as it is now, and on the basis of the direct examination of Mr. Allen and exhibits introduced by him. The objections are overruled. Exhibits 125 and 126 admitted.

(Whereupon, Plaintiff's Exhibits No. 125 and 126 for identification were admitted in evidence.)

(Testimony of James Anthony Allen.)

Mr. Etter: Exception, your Honor, and may I request at this time, your Honor, that prior to the noon recess I may make a statement for the record in regard to that exhibit, on behalf of the defendant Allen?

The Court: Which one?

Mr. Etter: The exhibit which appears attached to that audit, the first two sheets which appear attached to that audit.

The Court: You may proceed.

Q. (By Mr. Erickson): Well, Mr. Allen, you were not acquainted with the sources of money, then, that the Lexington Silver Lead Mines or the Montana Leasing Company had?

A. I was acquainted with the sources as to my own, Mr. Keane's personal money, the Delaware and the Independence.

Q. But you kept no track or knew not how much each contributed, [1198] if anything?

A. Oh, I knew they contributed something. As to what amount, no.

Q. Were you acquainted with the financial condition of the Montana Leasing Company in 1945, or the Lexington Silver Lead Mines, as to whether or not they had money enough to operate at that time?

A. I believe you would find, as we see it now, that at no time in conection with the operations was it the practice of keeping a surplus of funds in the Montana Leasing or the Lexington Silver Lead in

(Testimony of James Anthony Allen.)

itself, but to draw from the treasury of the Independence or the Delaware or personal, as it was needed.

Q. Did you have discussions with Keane about payroll accounts that had to be met in the Lexington?

A. Did I have discussions, that had to be met?

Q. Yes.

A. Well, he was as familiar with them as I was.

Q. Well, who made out the payroll checks?

A. Over at the mine, the superintendent.

Q. Under your direction?

A. Well, I wouldn't—no, not on every payroll check.

Q. Whose job was it to see that there was money enough in the bank to cover the payroll checks?

A. Mr. Keane assumed that authority, because of the heavy [1199] investment of the Independence.

Q. Isn't it a fact that in 1945 that the Montana Leasing Company or the Lexington Silver Lead Mines was short of money and in very desperate need of a new source of funds, the Independence funds had been exhausted?

A. Not to my knowledge, Mr. Erickson. The Independence funds according to that audit were not exhausted, the Montana Leasing Company was not pressed for any money, and if it had been, it could have been shut down on ten minutes' notice, if that was the case.

(Testimony of James Anthony Allen.)

Q. What time was this audit made that you speak of?

A. We find now it was 1947, but it still reflects the cash transactions to Mr. Keane in the months of June and July of 1945.

Q. Well, you wouldn't know the condition of the Montana Leasing Company in 1945 from an audit made in 1947, would you?

A. No, I would know it from Mr. Keane.

Q. What did Mr. Keane tell you about that?

A. Well, that at all times that in my opinion the Independence had sufficient money to carry through.

Q. Didn't he state to you that the money had run out from Independence about 1945, and that some other source of money would have to be secured?

A. He never did; it was never mentioned. [1200]

Q. I hand you Plaintiff's identification 8-k, which is a statement of the Lexington Silver Mines Company for the month of April, 1946, and hand you the cancelled checks in there, and refer you particularly to the check for cash dated March 31, 1946, for $2,890.30, and ask you which payroll checks that was made to cover?

A. This was not made to cover any payroll check contained in this statement. This was cash to be brought up that would be loaned, if it were necessary, for the storekeeper to have money to cash these checks, and which ones I wouldn't know.

(Testimony of James Anthony Allen.)

I did take this check and redeposit it in my personal account, and will show you on November 28, 1946, from an accumulation of such checks as that and others, where I deposited $8,000.00 on November 28 of 1946.

Q. Are there any payroll checks in the bank account, bank checks for April, 1946, that this check of March 31, 1946, was made to cover, any payroll checks?

A. That's misleading, Mr. Erickson. I didn't state at any time that I made checks to cover payrolls. I stated that the bank at Neihart—or the grocery at Neihart, which is a small town, and isolated from a bank by sixty miles in either direction, that it would require sometimes to have considerable cash on hand to meet the payroll checks that would come from all the mines.

Q. So you took this check, then, from the Rocky Mountain—— [1201]

A. I didn't take the check from the Rocky Mountain; I took the cash.

Q. Took the cash and gave that to the merchant at Neihart?

A. He didn't need it at that time, but I had it available if he did.

Q. You just kept it in your pocket?

A. That's right, and the check was made after I came back from Neihart, after I had received the cash for over a week.

Q. Where was the Rocky Mountain Cafe?

(Testimony of James Anthony Allen.)

A. Meaderville, Montana, on the road to Neihart.

Q. And that's right close to Butte?

A. It's right out of Butte.

Q. You say that you were acquainted with the fact that an injunction had been secured against you prohibiting you from promoting any mining company?

A. At the time the injunction was entered——

Q. Were you familiar with it? You can answer that, Mr. Allen.

A. Not familiar with it to the extent it prohibited me from entering any mining organization, no, at the time the consent decree was entered into.

Q. And you checked that with Mr. Newton, through your attorney, Mr. Johnston?

A. That would be two years later.

Q. Well, yes, in 1945 you did check with Mr. Johnston? [1202] A. That is right.

Q. And Mr. Johnston in your presence called Mr. Newton, an attorney for the Securities and Exchange Commission, who refused to give you permission to operate, and told you the injunction would have to run its course?

A. He did not tell me that.

Q. What did he tell you?

A. I didn't talk to Mr. Newton, but Mr. Johnston did, and as I understood from Mr. Johnston, that it would be possible, but that would have to come from Washington, D. C., but it still wouldn't

(Testimony of James Anthony Allen.)
prevent the organization for a full registration.

Mr. Erickson: Well, now, I move that answer be stricken as not responsive.

Mr. Etter: It's responsive to the question. "Operate" was the word used in the question.

The Court: Just a moment; let's hear the question.

(Whereupon, the reporter read the last previous question.)

The Court: What did Mr. Johnston tell this witness; now, you're not to give any inferences that you drew, but are merely to reproduce to the best of your ability what Mr. Johnston said to you about his call to Mr. Newton.

A. Shall I answer that now? [1203]

The Court: Yes.

A. He stated that Mr. Newton stated that would have to come from Philadelphia, that the Regional Office was not too familiar whether it could be accelerated or whether it couldn't be, that injunctions applied to just the new regulation which was put into effect, which was after the consent decree of the Lexington Company was entered into in 1943, and did not prevent me——

The Court: Just a moment; is this what Mr. Johnston said that Mr. Newton said?

A. Well, I don't know; Mr. Johnston told me this; whether Mr. Newton said it I don't know, but it did not keep me from being connected with an

(Testimony of James Anthony Allen.)

organization or promotion of any company if a full registration was made, or I think under the $100,000 exemption, but it did with respect to the $300,000.

Q. To your knowledge was a full registration made of Pilot or Extension, or not?

A. I don't know as to that.

Q. You didn't pay any attention to that?

A. Not too much, as to what they were registering under; I think it's the regulation A, as I've understood, which is not a full registration.

Q. Well, you stated in your direct examination that you knew nothing about the organization of the Lucky Friday Extension [1204] other than you heard Sekulic discussing.

A. My knowledge of what it was registered under, it would be common knowledge to anyone, not only to me.

Q. You were acquainted with the Big Friday property and Mr. Horning and Mr. Sekulic, were you not? A. Yes, I was.

Q. And they were acquaintances of yours and had been for some time? A. Yes, they had.

Q. And when the question was put up by Mr. Sekulic about advancing—was it $500.00 or $1,000 each——

A. I forget which it was; it was something in that neighborhood, five hundred or a thousand.

Q. ——were you willing to put up $500.00 yourself? A. No.

Q. Did you decline?

(Testimony of James Anthony Allen.)

A. I just was not interested in it. I don't know that I specifically declined. John constantly had some proposition at all times where to put money into.

The Court: It is 12 o'clock. The trial of this cause is recessed until 1:30. The jury will remember the admonition of the court.

(Noon Recess.)

(All parties present as before, and the trial was resumed.) [1205]

Cross-Examination
(Continued)

By Mr. Erickson:

Q. Mr. Allen, I'll hand you Plaintiff's Exhibit 47, those are stock certificates to Beatrice McLean in the Lucky Friday Extension Mining Company. Do you recognize those?

A. I recognize that they're Extension Mining Company certificates in the name of B. A. McLean, but as to how and when I received these particular ones I wouldn't be able to state specifically.

Q. Were they later sold for your account?

A. That I couldn't tell until I would look on the schedule, Mr. Erickson.

Q. I'll hand you Plaintiff's identification 49 and 49-a, and ask you if they will refresh your memory in connection with Exhibit 47?

The Court: Are they both identifications?

Mr. Erickson: Yes, they are identifications. 47 is an exhibit.

(Testimony of James Anthony Allen.)

A. Yes. This is dated December 17, 1946. It does, if these are the same ones, that's right.

Q. So this letter would indicate——

A. ——that I received the certificates.

The Court: Which letter is that?

Q. That is plaintiff's 49, and 49-a is the return card, registered return card, and that's signed "James A. Allen, by Arthur Lakes, Jr."? [1206]

A. That is right.

Q. And Arthur Lakes, Jr. was an employee of yours at that time?

A. For about two months, in the office.

Mr. Erickson: I will offer 49 and 49-a.

Mr. Etter: No objection.

The Court: Exhibits 49 and 49-a admitted.

(Whereupon, Plaintiff's Exhibits No. 49 and 49-a for identification were admitted in evidence.)

(Whereupon, check 3/31/46 for $2890.30 on Lexington Company by Allen was marked Plaintiff's Exhibit No. 127 for identification.)

Q. I'll hand you Plaintiff's identification 127, and ask you if that's the check to cash in the sum of $2,890.30, dated March 31, 1946, which I referred to this morning? A. That is right.

Mr. Erickson: I will not offer it at this time; it's for the purpose of rebuttal. Well, I will offer it at this time; I think it's properly identified. It was seen by counsel this morning.

(Testimony of James Anthony Allen.)

Mr. Etter: No objection.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 127 for identification was admitted in evidence.)

Q. Now, Mr. Allen, you state that you deposited out of your personal account certain monies in the Montana Leasing [1207] Company account in 1945, and yesterday there was admitted Defendant's Exhibit X, the first check in that series being a check dated April 11, 1945, to the Montana Leasing Company for $1,000.00, and signed "J. A. Allen, Trustee." What was the source of that thousand dollars you put in the Montana Leasing account?

The Court: What check is this?

Mr. Erickson: Check No. 1 in Exhibit X.

A. Let's see if I could give you that. I would have to have the work sheets from the office to show that. I believe it was from the sale of some of my securities in other companies; it could be.

Q. The sale of securities in what company?

A. It might be; it would be difficult for me to say right now.

Q. And the second check is a check for $1500.00 dated May 24, 1945, and the third check is a check dated May 28, 1945, for $1,000 payable to F. C. Keane, and I don't know how it's endorsed on the back. Do you know where that third check went for a thousand dollars, payable to F. C. Keane?

A. It was deposited with the Idaho First National Bank.

(Testimony of James Anthony Allen.)

Q. For the Montana Leasing account?

A. It doesn't state to whom, it just has the bank endorsement.

Q. What was the source of the funds comprising Defendant's Exhibit X there for 1945, monies that you paid to the Montana Leasing Company? [1208]

A. It was—we've gotten up a statement and attempted to trace all of these, which you and Mr. Denney are both familiar with. Sometime in January we came to your office in order to secure the Montana Leasing Company checks, in order that I might be able to do this very thing, to trace certain monies that came into my account and then out again, and I submit I'm not in a position at this time to state exactly what it is, specifically.

Q. You say you think it's from the sale of securities? A. Perhaps it would be.

Q. You don't know what securities they are, or who the securities came from?

A. They would be my personal securities, if it were from that source. I have had during that time checks from Mr. Keane, and in turn paid them back to him, and that may be the source of some of that, but I wouldn't say.

Q. Monies that you received from Mr. Keane?

A. It could be, but I couldn't say until I would check the work sheets, if it would show on that, or my bank deposits showing the source of it; that's what we attempted to do for over the six year period.

(Testimony of James Anthony Allen.)

Q. Then I'll hand you Defendant's Exhibit Y, checks which total $70,000 representing cash payments made by you in 1946 to the Montana Leasing Company. Can you state the source of those funds?

A. I believe I can pretty accurately, and I believe Mr. Denney, who has made the investigation in the brokerage houses, pretty well determine the source of all this money.

Q. These monies are monies received from the sale of stocks?

A. I wouldn't say that, no. They would be sales of stocks I had in corporations, not the Extension or Pilot; some of it would be sales of Extension stock; others would be for loans and mortgages I had.

Q. But you would say a substantial portion of this was from the sale of Pilot and Extension stock in 1946?

A. I would say not one penny of it was from the sale of Pilot stock in 1946.

Q. Would you say from Extension stock?

A. I would say some Extension stock, which was a year after the Extension stock had been offered.

Q. Exhibit Z, your checks to the Lexington Silver Lead Mines, successor to Montana Leasing, totalling $76,000, what would you say was the source of those funds for 1947?

A. A small portion of those funds would be from Extension and Pilot stock, but the majority of it would be from stocks in other corporations that I owned, in addition to mortgages and loans.

(Testimony of James Anthony Allen.)

Q. How much of this would be from the sale of Extension stock, if you know? [1210]

A. In 1947?

Q. Yes.

A. I would say it as an estimate, rather than get it exactly, about $15,000 of the $70,000 would constitute sales of Extension stock, and about $9,000 would constitute sales of Pilot in 1947.

Q. What other stocks did you sell to get that money?

A. Merger, Hunter Creek, Rainbow, Callahan Consolidated, Silver Syndicate, mortgages on my house and mortgages on my car, and personal loans without any security, to where I now owe $50,000.

Q. In 1946, how much of that came from Extension in 1946?

A. My records up to 1948 show in 1945 I received $5,337.50 for Extension stock, at a price of 21¼——

The Court: In 1945?

A. November, 1945.

The Court: How much did you receive?

A. $5,337.50; the average price of the stock was 21.35 cents. In 1946 it was $45,347.54, or a price of 15.637 cents per share. 1947 was $17,039.22, at a price of 4½ cents a share. In 1948 it was $4,687.50, or a price of 4½ cents a share.

The Court: I didn't get that last figure.

A. $4,687.50, at a price of 4½ cents a share. These are as close as the records we have been able

(Testimony of James Anthony Allen.)

to get in a hurry [1211] and take an accounting, under the conditions and from the records that we had.

Q. What time did you become president of the Pilot Mining Company?

A. October 8, 1948—1947.

Q. Wasn't it February that you became president, February, 1947?

A. No. Mr. Keane drew the minutes that way. I resigned so that the minutes would be corrected, right in Mr. Keane's presence, and Miss McLean or Mr. Mullen was put on the board of the Pilot that very day. I was elected that by the directors of the company on August 7, and Mr. James Wayne, the attorney at Wallace, drew the minutes.

Q. Was that '47? A. 1947.

(Whereupon, summary of sales account of B. W. Porter of Extension stock was marked Plaintiff's Exhibit No. 128 for identification.)

Q. I'll hand you Plaintiff's identification 128, and ask you to state if that is an accurate statement of your transaction with B. W. Porter, the witness who testified yesterday, with regard to the sale of Lucky Friday Extension stock transferred from certificate 14 in the name of J. V. Grismer for 1,229,700 shares?

A. I believe it would be substantially correct.

Q. What was the purpose of running your stock through Mr. Porter's account?

(Testimony of James Anthony Allen.)

A. I believe that Mr. Porter had some Hunter Creek stock that he had purchased from the Standard Securities at a high price, and there was no reason for running it through Mr. Porter's account in Wallace other than that he happened to be in Wallace before I was, and I asked him to arrange at Pennaluna Company for the sale of the stock, because we needed $5,000 at that time to meet a payroll.

Mr. Erickson: I'll offer 128.

Mr. Etter: No objection.

The Court: Exhibit 128 is admitted; there's no objection.

(Whereupon, Plaintiff's Exhibit No. 128 for identification was admitted in evidence.)

Q. When did you first become interested in the Lucky Friday Extension as a stockholder?

A. I would say in August, or I mean October, 1945.

Q. And how did you happen to get a stockholders' interest in the Lucky Friday Extension at that time? A. From Joe Grismer.

Q. And what was the reason that you sought to acquire a stockholder's interest in the Lucky Friday Extension at that time?

A. Because the market on all the stocks was very good at the [1213] time.

Q. And that's the time that you made a partnership agreement with Grismer whereby——

(Testimony of James Anthony Allen.)

A. I made no partnership agreement with Grismer at all.

Q. Well, you made some agreement with Grismer about the exchange of certain stocks?

A. That's right.

Q. It was an agreement to trade and exchange certain stocks, by which you got 300,000 Lucky Friday Extension? A. That is right.

Q. And you signed a written agreement with Mr. Grismer at that time?

A. Not at that time, no.

Q. Well, at a subsequent time?

A. At a subsequent time we did, yes.

Q. When was that agreement signed, after the indictment?

A. I don't know that it was after, and as a matter of fact it was reduced to writing at Mr. Grismer's suggestion. I had advanced him sometime in 1945——

Q. Well, I think you've answered the question. I just asked you when it was signed.

A. Well, I was just going to say that there was no apparent reason as far as I was concerned to reduce it to writing.

Q. But was it in 1948? A. I believe it was.

Q. You don't know what time it was?

A. I couldn't say, definitely.

Q. And the original agreement was made three years before, in 1945, then? A. That's right.

Q. And it was fully executed in 1945?

(Testimony of James Anthony Allen.)

A. Well, it was a continuing agreement; after we had to take the records and the companies away from Mr. Keane in order to hold the companies together it was just a question of using the stock for the purpose of getting sufficient money to keep the companies together.

Q. Now, you've heard the testimony here with regard to the organization of the Pilot Silver Lead Mines, and you've heard a conversation related with Mrs. Emeline Phelan, and you stated that that was substantially correct. What part of it is incorrect, in Mrs. Phelan's testimony?

A. Well, I couldn't remember offhand Mrs. Phelan's testimony, other than that I did go down to her home with Grismer and Grismer asked me to go down there to explain to her the central development, which I did.

Q. And you explained not only the central development, but you explained the organization of the Pilot Silver Lead Mines to Mrs. Phelan, didn't you?

A. I don't believe I did, and if Mrs. Phelan testified to that, I wasn't agreeing that that part would be substantially [1215] correct.

Q. Well, Mrs. Phelan went down to the Callahan Consolidated office to see you the next day?

A. Not to see me; to see Mr. Grismer, and I was there.

Q. But you talked to her?

A. I talked to her, yes.

(Testimony of James Anthony Allen.)

Q. And you explained the deal to her, and raised Mr. Grismer's offer, didn't you?

A. I explained Mr. Grismer's offer at that time?

Q. Yes, and raised the amount of money.

A. No, I think that was done at her home. I didn't tell her—I said if it was worth anything it should be worth twice as much, and Mr. Grismer carried on the agreement from there on.

Q. So your testimony is you did not make an agreement with Mrs. Phelan; Mr. Grismer made the agreement in your presence as you suggested, the amount as you suggested?

A. Repeat that, Mr. Erickson.

Q. Well, did Mr. Grismer make the agreement with Mrs. Phelan, or did you make the agreement?

A. Mr. Grismer made the agreement.

Q. But did Mr. Grismer accept the amount of cash for the claims as you suggested?

A. He didn't accept it; he paid that, or had it paid by Mr. Keane to Mrs. Phelan. [1216]

Q. So Mr. Grismer accepted the amount that you set for the claims?

A. I didn't set it; I didn't know at the time what his offer was.

Q. How did you raise it, then, and say they should be worth twice as much?

A. Just because they would be, for $300.00, any claim ought to be worth that much.

Q. The check was paid in Mr. Keane's office?

A. That I couldn't say.

(Testimony of James Anthony Allen.)

Q. Well, you didn't pay the check?

A. I didn't pay the check.

Q. And the agreement for the amount of stock that Mrs. Phelan was to receive, was that made by you, or by Mr. Grismer? A. By Mr. Grismer.

Q. Was Mr. Grismer sufficiently acquainted with mining stocks and mining finances to make a definite agreement for shares of stock?

A. I think Mr. Grismer is far more acquainted with mining and mining stocks than I ever will be. He's carried the Merger Mining case, charging mismanagement of it, for ten years in the courts.

Q. That's not responsive. Mr. Allen, you remember the testimony of Mr. Herrick, when you approached Mr. Herrick about the Cincinnati claims that later comprised the Pilot group? [1217]

A. I remember that, but I did not approach Mr. Herrick, and I don't believe Mr. Herrick testified that I did approach him.

Q. Well, did you have a conversation with Mr. Herrick?

A. Practically on the same basis as Mrs. Phelan.

Q. Did you make the agreement with Mr. Herrick?

A. I did not make the agreement; Mr. Grismer made the agreement.

Q. In your presence?

A. No, the negotiations were started with Mr. Herrick before I ever came into it.

Q. You heard Mr. Grismer testify that you knew

(Testimony of James Anthony Allen.)
more about the deal than he did, and that you did make the agreement; is that testimony incorrect?

A. That testimony of Mr. Grismer is an absolute falsehood if he said that, because he's known the claims, he's known the country, he's known Mrs. Phelan, and he's known Mr. Herrick for twenty years before I ever knew them.

Q. You heard the testimony of Mr. Horning, who testified earlier in this lawsuit, the attorney in Wallace, Idaho, who stated that he called you about the contract between the Lucky Friday Extension and the Big Friday, and you told Horning that the contract was a masterpiece; do you remember that conversation?

A. I do. I don't believe I told him that over the telephone; [1218] I don't believe I called him. I did ask Horning for a copy, after the original was signed, and if I made any reference to a masterpiece, like Mr. Keane called Horning the master, also, it was a masterpiece for the Big Friday Mine, but I don't recall saying it was a masterpiece.

Q. Well, did you get that copy of the contract from Horning, at what time?

A. I don't believe I ever got the copy from Horning.

Q. What time did you have some conversations with Horning about the Big Friday contract?

A. Sometime in July or August, when negotiations were started for the Hunter Creek.

Q. That was before you acquired any stock from Grismer?

(Testimony of James Anthony Allen.)

A. Before I acquired stock from Grismer, and before any arrangements for the stock from Grismer.

Q. Now, you were quite friendly with the defendant Grismer at all times up until a short time ago, were you not?

A. I was extremely friendly with Grismer, and until he testified here the other day I always considered to still be friendly with him. It seems as though when you dismissed the other six counts with Grismer it made some difference in his attitude toward me.

Q. You were friendly with Grismer——

A. And still am.

Q. ——up until Mr. Grismer entered a plea of nolo contendere in [1219] this court?

A. I was friendly with him after that. Mr. Grismer signed an affidavit in this civil suit we have against Keane after he entered the nolo contendere, which was read into the meeting here, or into the records.

Q. Well, Mr. Allen, when did you first realize that some money had been stolen from the Lucky Friday Extension and the Pilot Silver Lead Company?

A. I don't know that I would say that we realized that it had been stolen or embezzled. I think the real suspicion of that started about in June or July, when Mr. Keane was settling the Independence lawsuit.

(Testimony of James Anthony Allen.)

Q. June or July, what year?

A. Of 1946, with Mr. Horning and Mr. Hull and his law partner Mr. McCann. There was about $40,000 drawn out of the Pilot, as the audit now shows, during the month of June and July——

Q. Well, you've answered the question; I asked you when you became suspicious.

A. I would say that it would be about at that time.

Q. You knew that considerable money had been stolen or embezzled from the Lucky Friday Extension and the Pilot Silver Lead Mines by August 4, 1947, didn't you? A. By August 4, 1947?

Q. Yes. [1220]

A. Well, Mr. Keane brought a suit in June of 1947 in Wallace, Idaho——

Q. Well, did you know it, or didn't you know it?

A. He made a public announcement in the paper that he had borrowed all the money.

Q. Did you feel on August 4, 1947, that you were responsible for the stealing or the embezzlement of any monies?

A. I resent your implication, and I did not.

Q. All right.

A. I have stolen nothing in my life, nor have I embezzled anything.

(Whereupon, trust agreement was marked Plaintiff's Exhibit No. 129 for identification.)

(Testimony of James Anthony Allen.)

Q. I hand you Plaintiff's identification 129, and ask you if that is not a trust agreement which you entered into on August 3, 1947, agreeing to pay back certain monies?

A. That is right, and I refer you here to paragraph 1 of the agreement——

Q. No, I just asked you what it was.

A. It is a trust agreement, but where is the agreement with the trust? There's another agreement that accompanies this, Mr. Erickson, that should be in connection with that, in order to explain that.

Q. Is this a copy of the agreement that was signed? A. I wouldn't say. [1221]

Q. Well, look at it and see whether it was or wasn't.

A. Yes, I would say that it is exact. It was approved by the directors of both the companies at that time, and signed.

Mr. Erickson: I'll offer the agreement in evidence.

Voir Dire Examination

By Mr. Etter:

Q. Mr. Allen, is this the entire agreement?

A. No, that is not. That's a part of it. The agreement that supports that, that had to be signed before that, was where I denied each and every allegation in Keane's complaint, and he signed that.

Q. And that's left off?

A. And this is a negotiated settlement with the

(Testimony of James Anthony Allen.)

companies that he claimed it was his own personal interest in.

Mr. Etter: I'll object on that ground, that it's not the entire agreement.

Cross-Examination
(Continued)

By Mr. Erickson:

Q. This part of the agreement here is completed down to the signature and the acknowledgment part, is it not, signed by you and Mr. Keane, your signature and Keane's signature appear thereon in typewriting?

A. That's right, but there are two agreements that have to be together.

Q. This is a complete agreement in itself, but some other agreement should be attached hereto?

A. The agreement that supports that trust is what is missing, that explains the reason for that trust.

Q. But this is the complete trust agreement without the explanation? A. That is right.

Mr. Erickson: I offer 129.

The Court: Well, let me see it. As I understand it, the objection, and only objection, is that the witness has testified that there was another agreement that ought to accompany this one.

Mr. Etter: I'd like to ask a couple of questions on voir dire first.

The Court: All right.

(Testimony of James Anthony Allen.)

Voir Dire Examination

By Mr. Etter:

Q. You state there was another agreement that ought to accompany that agreement, Mr. Allen?

A. That's right.

Q. And what were the circumstances surrounding the execution of the two agreements, including the one that is not here, and the one that's been offered?

A. In March or April a receivership was filed by parties in Spokane against the Independence and Mr. Keane. I brought an action against Mr. Keane and the Independence in Federal Court in Coeur d'Alene, the Pilot and Extension through Mr. Wayne brought an action against the Independence [1223] and Mr. Keane for an accounting of monies that had been diverted from these companies into his personal account and into settling lawsuits. We brought an action as the Lexington Silver Lead against Mr. Keane for an accounting. These was just merely an answer made, then Mr. Keane two months later through his attorneys, he testified here however he didn't know anything about what the complaint was, brought an action against me and nineteen companies for a receivership, June 25, 1947. Mr. Horning intervened to negotiate a settlement of this receivership; negotiations were carried on for practically three weeks of Mr. Keane's claim of an interest in these various corporations that he had borrowed this money from, the Independence,

(Testimony of James Anthony Allen.)

borrowed it from the others. The negotiations were carried out, and certain stocks were put up from the companies into the trust in payment of these funds.

Q. I'm speaking about the agreement that isn't here. What did that agreement have to do with this agreement?

A. That the allegations in his complaint as against me as being a partner and this and that, and the borrowing of these funds, was specifically denied by me to each and every allegation in there.

Q. And that was signed?

A. Yes, and in order to compromise and protect these [1224] companies the trust was set up.

Q. Was this conditioned upon the other?

A. Very definitely, otherwise it would never have happened.

Q. Would you have signed this if the other hadn't been signed? A. No.

Q. And which one was signed first?

A. The other one.

Mr. Etter: I object; it doesn't give the jury a clear picture of what was intended or accomplished. It's incompetent, irrelevant and immaterial.

Mr. Erickson: We have no objection to the other agreement if counsel have it.

Mr. Etter: It's been on file in a court of record since April 25, 1948.

Mr. Erickson: We submit it shows dealings between the two principal defendants; if that isn't

(Testimony of James Anthony Allen.)

the whole picture the witness has a right to explain the whole picture.

The Court: Upon the objection made, the objection is overruled. The government has a right on cross-examination to offer certain exhibits, and that doesn't preclude the defendant from offering some other exhibit.

Mr. Etter: Exception.

The Court: Exhibit 129 admitted for what, if anything, worth. [1225]

(Whereupon, Plaintiff's Exhibit No. 129 for identification was admitted in evidence.)

Cross-Examination
(Continued)

By Mr. Erickson:

Q. Mr. Allen, this agreement refers to certain stock agreed to be put up by yourself, J. A. Allen, and F. C. Keane, and the agreement reads as follows: "This agreement, made and entered into this 4th day of August, 1947, by and between F. C. Keane, of Wallace, Idaho, party of the first part, and J. A. Allen, of Spokane, Washington, party of the second part, both hereinafter called Trustors; and Eugene F. McCann and L. J. Randall, both of Wallace, Idaho, and Therrett Towles, of Spokane, Washington, parties of the third part, hereinafter called Trustees, Witnesseth: Whereas, it is the desire and intention of the Trustors to provide for and pay off a certain indebtedness due Pilot Silver-Lead Mines, Inc. and Lucky Friday Extension Min-

(Testimony of James Anthony Allen.)

ing Company, hereinafter set forth, and for that purpose the Trustors desire to create a trust as herein set forth, Now, therefore, the Trustors do hereby and by these presents make, constitute and appoint Eugene F. McCann, L. J. Randall, and Therrett Towles the Trustees under the terms and provisions of this trust agreement, all of said Trustees to serve without bond. The trustors do hereby mutually covenant and agree that there shall be turned over, delivered, placed and deposited with said [1226] Trustees forthwith the following described property, to-wit: Coeur d'Alene Consolidated Silver-Lead Mines, Inc., 525,000 shares"—were you to put up that 525,000 shares?

Mr. Etter: I object; I think the trust speaks for itself.

The Court: Overruled.

Mr. Etter: Exception.

A. No, the corporation put that up.

Q. Which corporation?

A. The Coeur d'Alene Consolidated.

Q. Pilot Silver Lead Mines, Inc., 300,000 shares; were you to put that up? A. No.

Mr. Etter: I'm going to object.

The Court: Same ruling.

Mr. Etter: Exception.

Q. The Lucky Friday? A. No.

Mr. Etter: Same objection.

The Court: Same ruling.

Mr. Etter: Exception.

(Testimony of James Anthony Allen.)

Q. Hunter Creek Mining Company?

A. The corporation.

The Court: It will be understood that you have an objection to all the questions relative to the stock in [1227] this exhibit, that is, relative to the named stock in the exhibit.

Q. Alma? A. The corporation.

Q. The Lexington Silver-Lead Mines, Inc., 400,000 shares, were you to put that up?

A. The corporation was to put it up.

Q. The Hunter Silver-Lead Mines, Inc., were you to put that up? A. The corporation, also.

Q. The Goldstone, 250,000 shares, were you to put that up? A. No.

Q. And the War Eagle Silver-Lead Mines, Inc., 250,000 shares, were you to put that up?

A. No, sir.

Q. And the cash, Coeur d'Alene Consolidated Silver-Lead Mines, Inc., $25,000, were you to put that up? A. The corporation.

Q. And B. W. Porter, $8,000 in cash, was Mr. Porter to put that up?

A. Mr. Keane wrote Mr. Porter a letter and advised him to pay it into the trustees.

Q. Now, why did you sign and agree to that on behalf of these corporations of which you are in control if you did not steal or embezzle some of the money? [1228]

Mr. Etter: Just a minute; I'm going to object on the ground that the reason would be perfectly

(Testimony of James Anthony Allen.)

ascertained and set forth from the agreement not here.

The Court: Overruled.

Mr. Etter: Exception.

The Court: That's a reason for the objection. I may say this, that I will cause you to reframe the question. You may ask him why he signed that if he was not responsible.

Q. (By Mr. Erickson): Yes. Why did you sign this agreement if you were not responsible?

A. Because we had the interest of the stockholders and the corporations at heart, to clean them up, and it's the very thing that I had been trying to get Keane to do for a year and a half, to make such a disclosure and what money was his personal money and what belonged to corporations that he was in control of and handling the cash.

Q. So you were willing to sign an agreement to pay up indebtedness of the Lucky Friday Extension and the Pilot, although you were not a participant?

A. That is exactly right, and that agreement does not indicate that at all, Mr. Erickson; it indicates that these stocks are put in that trust for the purpose of liquidating the indebtedness, and by that, Mr. Keane's and Judge Featherstone's lawsuits, they would have been liquidated, [1229] and they're attempting to try and reopen that and claiming $70,000 for himself. I might add, in the complaint, the day Judge Featherstone signed that he accepted a check from me for the Northwest Powder Com-

(Testimony of James Anthony Allen.)

pany for $275.00, which is named in the complaint. You wonder why a complaint was made, when you try to do anything with the legal circles in Wallace or the courts in Wallace.

Q. So you feel you were not responsible in any way for the shortages to Lucky Friday Extension or the Pilot Silver Lead, but still you signed this agreement? A. Absolutely right.

Q. You did that in a benevolent and philanthropic——

Mr. Etter: Just a minute; if that isn't argument —I object to it on that ground, purely improper cross-examination.

The Court: Most cross-examination is argument, counsel; I will sustain the objection, but if we will eliminate all cross-examination that's argumentative, there will be very little cross-examination.

Mr. Etter: I grant you that, your Honor. I think there are degrees.

Q. (By Mr. Erickson): What consideration did the Coeur d'Alene Consolidated Silver Lead Mines receive from putting up 525,000 shares of stock in pursuance to this trust agreement? [1230]

A. What consideration did they receive?

Q. Yes; you said the corporation put up the stock.

A. Mr. Denney informed me in 1947 that upon his investigation into the Idaho First National Bank, if you'll refer to Mr. Randall's audit of the Lucky Friday Extension, you'll note that he has a——

(Testimony of James Anthony Allen.)

Mr. Erickson: I move the answer be stricken.

A. I want to explain it to you, Mr. Erickson.

The Court: I'll strike it, because I can't tell how much is a statement of the witness and how much is a statement of Mr. Denney and how much is answer to the question. You may read the question. You were asked what consideration this corporation got, and you may answer that if you know.

A. I know from Mr. Denney's investigation when he came into the office that he had gone into the Idaho First National Bank——

Mr. Erickson: I move the answer be stricken.

The Court: Yes; you may say if you know.

A. I know from Mr. Denney that it was $25,000, $20,000 of which was from the $40,000 check of the Pilot money.

Q. All right; what consideration did the Pilot Silver Lead Mines receive for 300,000 shares of stock?

A. You're reading that wrong, are you not?

Q. Well, the Pilot you said put up 300,000 shares of stock. [1231]

A. That was Mr. Keane's stock, as I recall it.

Q. Oh, that was Keane's stock?

A. He had charged me once with selling it at ten cents.

Q. Did 200,000 shares of that come from Grismer?

A. That I couldn't say, because the manner in

(Testimony of James Anthony Allen.)

which they handled the stock certificates in the office is not known to me, and I believe he testified they had been endorsed in blank, and then drawn off whichever way.

Q. What consideration did the Hunter Creek Mining Company get for the 100,000 shares of stock it put up? A. It didn't put it up.

Q. Well, who put up the 100,000 shares?

A. It hasn't been put up yet.

Q. And the Alma Mining Company, 400,000?

A. You say what consideration did they receive?

Q. Yes.

A. Nothing more than Keane's interest, to which he claimed a one-third interest in all claims.

Q. And the Lexington Silver Lead Mines, what consideration did they receive for 400,000 shares?

A. Nothing more than to compromise the lawsuit.

Q. And what consideration did the Hunter Silver Lead Mines receive for 350,000 shares?

A. The same, to compromise the lawsuit.

Q. So that all these companies were interested in compromising [1232] the lawsuit, agreed to put up the stock to get rid of the lawsuit?

A. Exactly, and to make whole if they could the Pilot and the Extension, because of Keane's defalcations in it.

Q. The other companies were interested in making good his defalcations?

A. When they were named in the lawsuit as

(Testimony of James Anthony Allen.)

having an interest in them by Keane, you can always effect a compromise.

Q. I hand you Montana Leasing Company check, exhibit 8-c-1, signed by yourself to Kent & Rusch for $59.99, and ask you what that is for?

A. That is for insurance on my cars that I used in mining business.

Q. I hand you Plaintiff's identification 8-c-2, a check from the Montana Leasing Company signed by yourself to the Inland Empire Racing Association for $200.00.

A. That's for my box at the race track, which would be charged against me personally in the corporation.

Q. The corporation would later make a charge to you personally?

A. According to the way Keane was to keep records, that would be right.

Q. Did you have an understanding with Keane about that? A. Oh, indeed.

Q. I refer you to Plaintiff's Exhibit No. 39, the escrow [1233] agreement between Coeur d'Alene Mines Corporation, signed by R. E. Jacobs, President, and Coeur d'Alene Consolidated Silver Lead Mines, by J. A. Allen, President, and ask you to state what that transaction was, Mr. Allen, the transaction there involving the check for $25,000?

A. This was pursuant to agreement gotten up by Mr. Keane and Mr. Horning, and at the time Mr. Keane was president of the Coeur d'Alene

(Testimony of James Anthony Allen.)

Consolidated. My understanding is that Mr. Keane received this cashier's check from the Idaho First National, payable to the Coeur d'Alene Mines Corporation, gave it to Mr. Horning; Mr. Horning deleted this part of the thing, Mr. Horning carried it in his pocket until May 23, and on May 23 Grismer and I went into his office as directors of the Coeur d'Alene Consolidated, and the check was handed to the Coeur d'Alene Mines at a meeting at 7:30 on May 23.

Q. Do you know where this $25,000 came from?

A. My understanding at that time was Mr. Keane was borrowing Mr. Gyde's money of $15,000. Mr. Horning and others were to put up cash also, and Mr. Keane said he would take care of it all.

Q. This is your signature that appears on there?

A. That is right, it is my signature.

Q. You say that Keane was president, although you signed it?

A. On the day before, Mr. Keane was president. He resigned [1234] through the minutes, the minutes indicate he resigned in February, but the Coeur d'Alene Mines Corporation have a letter of April 22 wherein he signed it as president of the Coeur d'Alene Consolidated, when the agreement was first entered into.

Q. This agreement is dated May 23; you say Keane resigned May 22?

A. I presume he did, because he was acting as president up until the date of the agreement.

(Testimony of James Anthony Allen.)

Q. Did you have some discussions with Keane about the embezzlement of that money from the Pilot? A. No, Mr. Erickson, I did not.

Q. You state that you had no conversations with Mr. Elmer Johnston of Spokane about the preparation of the Pilot prospectus?

A. About the preparation of the Pilot prospectus?

Q. Yes. A. Not specific, to my knowledge.

Q. Well, as a matter of fact, Mr. Johnston sent you carbon copies of most of the letters that he wrote about the—well, I'll ask you if he did about the Lucky Friday Extension Mining Company prospectus for the second issue, the supplemental prospectus for the second issue, if he discussed that with you? A. I don't think so. [1235]

Q. I'll hand you Plaintiff's Exhibit 87, a letter by Elmer Johnston to the Lucky Friday Extension Mining Company; it's noted on the bottom "copy to J. A. Allen;" did you receive a copy of that?

A. Not to my knowledge, Mr. Erickson, that I can recall. This is on January 11, 1946.

Q. Yes, that was about the time of the second issue, as I recall it, of the Extension; the second public offering to the brokers of 300,000 shares.

A. On many occasions I have transmitted information back and forth from Mr. Johnston to Mr. Keane, and on some occasions I have carried papers to Mr. Johnston from Mr. Keane, but as to the details in connection with it, I couldn't state.

Q. Well, you certainly had nothing to do with

(Testimony of James Anthony Allen.)

aiding Mr. Johnston in preparing the prospectus, then?

A. Mr. Johnston is an S.E.C. expert, I am not; I did not.

Q. Was it Mr. Elmer Johnston of Spokane who advised you that the consent injunction obtained in the Western District of Washington was not in effect in 1943? I'll withdraw that question. Was it Mr. Johnston that advised you, Elmer Johnston advised you that the injunction would not prohibit you from filing under regulation A of the Securities Act?

A. You say that it would not prohibit me? [1236]

Q. Yes.

A. I don't remember any such. I didn't make such a statement as that.

Q. Didn't you testify on direct examination that Elmer Johnston told you that it wouldn't affect you under regulation A, for an issue under $100,000?

A. I don't believe I did.

Mr. Emigh: I don't think there was anything said about regulation A; there was something said about $100,000.

A. I think Mr. Johnston advised that a full registration, but as to what to do with regulation A, or the $100,000, I don't know.

Q. Well, who advised you that the restriction as to your companies did not apply in 1943, if anyone did? A. What is that?

Q. Who advised you that the restriction did not

(Testimony of James Anthony Allen.)

apply in 1943 as to your being a promoter in the company, if anyone so advised you?

A. I don't believe anyone advised, in 1943.

Q. I thought you testified this morning that you were advised by someone that the prohibition didn't apply to you?

A. I think you're wholly mistaken in what I testified. I think I stated that it was my understanding, and I don't [1237] know when this information was given to me, but I think Mr. Stocking would know the law much better than I do, that at the time the consent decree was entered into, there were no prohibitions on it for a full registration.

Q. Did Mr. Johnston advise you that there were no prohibitions at the time the injunction was entered into?

A. I didn't say that, and I know that he didn't, because I made no inquiry on it.

Q. Mr. Allen, I'll hand you Plaintiff's Exhibit 114, in which 25,000 shares of stock were sold in Lucky Friday Extension Company, entitled "Sales by J. A. Allen of Lucky Friday Extension stock transferred from certificate 15 for 300,000 shares, issued on July 6, 1945, to F. C. Keane for legal services." You sold that stock, did you?

A. I did if that's the same stock, in November and December.

Q. By E. J. Gibson & Company?

A. That's right, through Helen Jorgenson, my wife's account.

(Testimony of James Anthony Allen.)

Q. That's your wife's maiden name?

A. That's right.

Q. And that is $6,537.25, for 25,000 shares, which is about 26 cents a share?

A. I think I mentioned that this morning, yes, it shows on the schedule.

Q. What was the occasion for using your wife's maiden name in that transaction, Mr. Allen? [1238]

A. I'm very fond of my wife and family, Mr. Erickson, and it was not for any purpose to conceal any activity in the Extension stock.

Q. And that sale was made within a few months after the organization of the Lucky Friday Extension Company, was it not?

A. And as I understand, the stock in question was placed in the prospectus, and it was stated in the prospectus it would be sold at any time, even with the public offering, that it was known as free stock.

Q. How did you happen to get that stock from Keane?

A. I assigned to Mr. Keane an option that I had to purchase additional Delaware stock, which Mr. Keane did later purchase.

Q. How much stock have you sold, in dollars and cents, in the Lucky Friday Extension Mining Company and the Pilot Silver Lead Mines Company since you became interested in those companies, either in your wife's name or your name or your secretary's name or B. McLean's name?

(Testimony of James Anthony Allen.)

A. I'll answer it by this, that after we were left with the bare corporations, all the ramifications that came, most all the stock that was sold excepting what Keane sold, and I understand that was around $40,000 worth, was sold through my accounts, and I would state that in the Extension stock, up until 1948, for which I am purchasing back [1239] some 300,000 shares of this at about seven or eight thousand dollars, would be $73,423.01. That would be an average price of 8.966 cents for the price of the stock. As to the Pilot, I think it would be 525,000 shares at an average price of about three cents a share.

Q. I'll ask you if you did not receive approximately a hundred and forty or a hundred and fifty thousand dollars?

A. I say that's an absolute falsehood; I did not.

Q. Well, what would be the correct amount of your receipts from the sale of all stocks in Lucky Friday Extension and Pilot Silver Lead since either before or after you got control of the companies?

A. I think I have stated it right here, sixteen and seventy-three.

Q. How much does it amount to in money?

A. Well, that's pretty simple to figure; that would be $89,000.

Q. And that was the money that you put into the Montana Leasing Company, that represented the personal monies, a large part of them, that you put into Montana Leasing?

(Testimony of James Anthony Allen.)

A. Oh, no; no, no. You've got the figures here, the amount of money that's gone into the Montana Leasing Company. I would say that from other sources and other stocks, that I have put in more money than what I have received by about $80,000, than what I have received from the sale of the stock [1240] or what I would have drawn out of the Montana Leasing Company that would be chargeable against my personal account, in the period of time.

Q. Well, now, you were quite interested in Pilot at the time Mr. Grismer was working up there in the summer of 1946, were you not?

A. At what time in 1946?

Q. Well, I mean in July and August of 1946, when Mr. Grismer was working up there and complaining to you that the bills weren't being paid.

A. I think his complaints started in September and October, the same time as mine did.

Q. You weren't apprised of the fact that there wasn't money enough to cover the bills until that time? A. I was not.

Q. So that you became suspicious of Keane at that time?

A. Grismer and I both did, and we made several trips to his house.

Q. I'm not asking about Grismer, but you became suspicious at that time? A. I did.

Q. And you tried to find Mr. Keane and talk to him at that time?

(Testimony of James Anthony Allen.)

A. Well, he had been evading much prior to that, but it was never from any suspicion, I didn't attach too much suspicion [1241] to it, because he was dealing with such men as Judge Featherstone, Chas. Horning, and Mr. Hull, Gene McCann, his general law partner, was in his office in April during all the time the Pilot money came into the office and all the time it went out, and I felt—I don't know that I felt that, but in the light of him dealing with those men, there should be no reason for me to be put on notice that he wasn't handling the affairs of the company properly.

Q. You didn't even ask to see your Montana Leasing Company records?

A. I trusted him implicitly. We wanted audits since 1945, but Mr. Keane would say, "Just as soon as the Independence litigation is settled we'll have an audit of the three companies." The Independence was settled in June, 1946, for which at that time there was some $40,000 went out of Pilot, and which we think went into Keane's account and out to Horning, Hull, McCann and Langroise, and we asked you to come in and I would submit my personal accounts to you in January, and you refused to do it.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

The Court: His answer may be yes or no, and

(Testimony of James Anthony Allen.)

all that he has said is purely volunteered. [1242]

A. If I may add a little more to that question——

Q. Just answer it first. A. I didn't ask?

Q. Yes. A. To see the Montana records?

Q. Yes.

A. I made several demands on them.

Q. Who did you make the demands to?

A. Irene Vermillion, in September.

Q. Did Irene Vermillion permit you to see them?

A. She did not; she told me that Keane told her I had been through for a long time, and that I would see nothing. I further went over to the S.E.C. office of Mr. Denney and Mr. Stocking in May of 1947 and asked them to subpoena the records.

Q. When did you go to Keane's home? Was it in September, or December, or October?

A. I would say sometime in October.

Q. And you think it was about 9:30 in the evening?

A. I am positive it was earlier than 9:30; perhaps 9 o'clock.

Q. I'll ask you if you didn't demand at that time that Keane turn the records over to you or you would do three things, disbar him, send him to the penitentiary, or break him?

A. I might have said break his neck.

Q. Well, I mean break him financially. [1243]

A. I said those three things, but I didn't say

(Testimony of James Anthony Allen.)

to turn over these records; I said to make a disclosure and to turn over and complete the Lexington Corporation, or there would only be three things could happen to him, he'd be disbarred and he'd go to the penitentiary.

Q. I'll ask you if you didn't tell Mrs. Keane that, either alone or in the presence of Keane?

A. I think that was told in the presence of Mrs. Keane, and I pleaded with her if she had any influence with Keane, to use it and make this disclosure and quit evading everybody.

Q. Did you demand the records at that time, and tell Mr. Keane that you had finances enough to handle the deal? A. I should say not.

Q. Did you tell the Keanes, either Mr. or Mrs. Keane, that this is going to cost $200,000?

A. I never mentioned the sum of $200,000. I told Keane that from all appearances it looked as though he was short about $100,000 in some companies.

Mr. Erickson: That's all.

Redirect Examination

By Mr. Etter:

Q. Mr. Allen, what primary education did you have?

A. I left Immaculate Conception School in Butte in the sixth grade.

Q. Sixth grade education?

A. That's right. [1244]

Q. Where did you get your later high school or grade school education?

(Testimony of James Anthony Allen.)

A. After I was married I took correspondence courses.

Q. From Gonzaga?

A. From Gonzaga and Northwestern Business College.

Q. What were you doing then?

A. Cutting meat and running a grocery store.

Q. All right; did you take further extension courses by correspondence? A. Right.

Q. And a special tutor? A. That's right.

Q. This law school education you have, when did you get that?

A. I finished that in 1937.

Q. And were you married at that time?

A. Yes, and had my two children.

Q. And what were you doing while you were taking that education?

A. I was working at the time.

Q. Getting back to this trust agreement, I'll ask if you ever discussed the terms of the trust agreement with Mr. Denney? A. Many times.

Q. And when did you have the first discussion with Mr. Denney about this trust agreement setup?

A. I think I initiated the trust agreement for the purpose of [1245] cleaning up the companies.

Q. I'll ask you if Mr. Denney and the S.E.C. didn't know all about that trust agreement?

A. They were informed on it in May.

Q. And I'll ask you whether the S.E.C. and Mr. Denney had anything to do with the selection of the trustees in the trust agreement?

(Testimony of James Anthony Allen.)

A. If they had anything to do with the selection of them?

Q. Yes.

A. I don't know, than other it may have been a suggestion of Randall between the other two trustees.

Q. Did Mr. Denney ever mention that to you?

A. I think we discussed it with Mr. Denney.

Q. And how many times did you discuss the trust agreement that's here with the S.E.C. and Mr. Denney?

A. I can't enumerate them, they were so many times.

Q. And where did you have these discussions?

A. In my office.

Q. And what was the nature of the discussions?

A. Well, they were familiar with what we were doing in all respects.

Q. What were the nature of the discussions, Mr. Allen?

A. Well, the purpose was to make the companies whole.

Q. Well, did you discuss that?

A. Yes, indeed I did. [1246]

Q. All right; were any suggestions made by Mr. Denney in that respect?

A. Well, he thought it was a good idea.

Q. And did he make any suggestions about the stock held in the trust?

A. No, I don't believe——

(Testimony of James Anthony Allen.)

Q. As to sale?

A. Oh, as to sale, oh, yes. The stocks that are in the trust, excepting the Pilot and the Extension, would have to be registered before they could be sold.

Q. Was there any other suggestion made with respect to sale of any of the stocks?

A. I don't recall.

Q. Well, were any bids made for the purchase of any of the stock?

A. Oh, yes. We put in a bid, I forget what it was, for $10,000 on certain blocks of the stock. McCann, Keane's law partner, rejected it on the basis that he didn't think it was sufficient. Mr. Denney did go to Wallace at that time and meet with two of the trustees and Mr. Langroise, and told them that he would like them to not turn any of the money back to the companies to the present directors, who were Grismer and myself. He didn't tell me direct, but Mr. Randall told me.

Q. Did you take it up then with Mr. Denney?

A. I think I did later on, and I believe he denied that he said it.

Mr. Etter: That's all. Before Mr. Allen leaves the stand, I have just conferred with counsel for the government, your Honor, and they will agree to stipulate that we may place in the evidence a copy of the original agreement which pertains to the trust agreement admitted in evidence as Exhibit 129. We have a copy of it, but it's not available

(Testimony of James Anthony Allen.)

here, but we want to accelerate the proceeding, so we will submit that.

The Court: You mean the agreement that you say accompanied the trust agreement?

Mr. Etter: Yes, your Honor.

Mr. Erickson: And I think further, while we're on that, that the figures should be filled in on these blanks here; this is obviously incomplete.

Mr. Towles: I can do that from this copy here.

Mr. Etter: Then it will be stipulated Mr. Towles will supply a complete agreement with all blanks filled in both agreements.

The Court: What is that agreement that you have here?

Mr. Erickson: This is 129.

Mr. Etter: We will stipulate that Mr. Towles will supply complete copies of the entire agreement with the [1248] figures in it.

Mr. Erickson: Then that may be substituted for 129, and 129 withdrawn when Mr. Towles substitutes the complete agreement.

Mr. Etter: It is so agreed.

The Court: All right.

Mr. Erickson: There are no further questions.

(Whereupon, there being no further questions, the defendant was excused as a witness, and resumed his place with his counsel.)

Mr. Etter: Subject, your Honor, to completing the record with the substitution of the exhibits which

have been stipulated for admission, the defendant rests.

The Court: The defendant rests, subject to completed and substituted exhibit 129 and accompanying agreement?

Mr. Etter: Yes, your Honor.

The Court: All right. Any rebuttal?

Mr. Erickson: Yes, we have some rebuttal?

The Court: Well, maybe we'll gain time by taking our recess now. There will be a ten minute recess.

(Short recess.)

(All parties present as before, and the trial was resumed.)

The Court: You may present your rebuttal testimony. [1249]

ELEANOR KEANE

called as a witness on behalf of the plaintiff, in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stocking:

Q. Will you state your name, please?

A. Eleanor Keane.

Q. And are you the wife of the defendant F. C. Keane? A. Yes, I am.

Q. You'll have to speak up, Mrs. Keane, so that all of the jury can hear you, please. You live at Wallace? A. Yes, I do.

(Testimony of Eleanor Keane.)

Q. Do you know the defendant Allen?

A. Yes, I do.

Q. How long have you known him?

A. Since 1938.

Q. Now, with respect to a meeting at your home in 1946, do you have some recollection of the defendant Allen having a conversation with your husband there? A. Yes, I do.

Q. And about what time would you fix that, what date, what time of the year?

A. I couldn't be sure of the date; it was in the fall, I believe.

Q. And that would be the fall of 1946?

A. Yes. [1250]

Q. You'll have to speak louder. I can hardly hear you, sitting here, and I know that the jurors over there are having difficulty. What time of the day or night was that visit made by the defendant?

A. He called on the telephone about 3 o'clock in the morning, and my husband answered the phone, and said he didn't wish to talk with him at that time, and I didn't get up, but my husband did, and he locked the front door, which is not a habit of ours.

Q. Which is what?

A. Not a habit of ours.

Q. Oh, I see, as to locking the front door?

A. Yes, thinking that if Mr. Allen came down, that he would leave. He pounded on the door and demanded——

(Testimony of Eleanor Keane.)

Q. Who pounded on the door?

A. Mr. Allen pounded on the door.

Q. And when was that with respect to the telephone call?

A. Probably fifteen minutes later.

Q. So shortly after 3 in the morning——

A. That's right, and demanded to be let in, and rather than disturb the neighborhood, my husband got up and let him in.

Q. And then what happened, Mrs. Keane?

A. I didn't get up, but I heard the—I heard loud voices, I mean I heard Mr. Allen's loud voice in the living room, and I didn't come out for about a half an hour or so, then [1251] I came out and told him that if he had anything to discuss with Mr. Keane, that I wish he would do it at his office and not at our home in the middle of the night.

Q. And what sort of a discussion did this appear to be, a friendly discussion?

A. No, it didn't appear to be friendly, although I didn't hear the conversation before I came out of the bedroom.

Q. Now, with respect to the conversation after you came out of the bedroom, do you have any recollection of any part of that conversation?

A. Yes, I do.

Q. What is your recollection?

A. He threatened him.

Q. Who is this?

A. Mr. Allen threatened my husband. He was

(Testimony of Eleanor Keane.)

quite abusive. He said that he would see that he would be disbarred, that he was going to break him, and that this thing or this deal was going to cost them $200,000, and that my husband didn't have it, but that he did, and therefore my husband would go to the penitentiary, but he would not.

Q. What happened after that while you were there? A. Well, he wanted a drink.

Q. And what was Mr. Allen's condition at that time?

A. He appeared to be very intoxicated.

Q. And did he leave then, or did you give him a drink? [1252]

A. No, he didn't leave then. My husband went back to bed, thinking that if he left that Mr. Allen would leave, but he didn't leave.

Q. Did anybody make any request to him to leave?

A. I did. I called a taxi for him twice, and he wouldn't take it.

Q. And what time did he finally leave?

A. It was probably 5:30.

Q. Did he state for what purpose he wanted to remain there after your husband had left the room?

A. He wanted to go to sleep.

Q. And you didn't grant that permission?

A. I would not.

Q. And what was your husband's condition on that night with respect to whether or not he had been drinking?

(Testimony of Eleanor Keane.)

A. He was stone sober; he hadn't had a drink for over two months.

Q. Was your husband still awake when Mr. Allen left? A. Yes.

Q. And he was in the bedroom?

A. That's right.

Q. What is the situation with regard to your home there, can you describe it?

A. We live in an apartment house with another family.

Q. On which floor do you live? [1253]

A. We live on the lower floor, and the other family lives upstairs.

Q. And what is the situation with regard to the proximity of the neighboring houses to your house?

A. They're very close together.

Q. What is it that fixes this conversation and this incident in your mind, Mrs. Keane?

A. I imagine the hour of the morning that he came down.

Q. Had anything ever happened like this before with Mr. Allen or with anybody else?

A. No.

Q. Now, was Mr. Allen down there, though, from time to time prior to this incident?

A. Frequently.

Q. And did you ever hear Mr. Allen make any statement concerning Mr. Keane, your husband, with respect as to whether or not he was, Mr. Keane was his partner?

(Testimony of Eleanor Keane.)

Mr. Etter: Object to that on the ground that there's not a proper foundation laid by that question for this witness, for the purpose of impeachment, if that's it.

The Court: Overruled. The defendant made the general complete statement as to all times and all persons. Objection overruled.

Mr. Etter: Exception.

Mr. Stocking: You may answer. [1254]

A. He's referred to him as his partner in my presence many times.

Mr. Stocking: That's all.

Mr. Etter: That's all.

(Whereupon, there being no further questions, the witness was excused.)

FRANCIS CLAYTON KEANE

recalled as a witness on behalf of the plaintiff, in rebuttal, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stocking:

Q. Mr. Keane, I'll show you what has been introduced in evidence as Plaintiff's Exhibit 127, which is a check written by Mr. Allen to cash on March 31, 1946, in the sum of $2,890.30, bearing the endorsement of Rocky Mountain Cafe in Butte, Montana, and ask you if you have any knowledge as to what this check was given for?

A. Gambling.

(Testimony of Francis Clayton Keane.)

Q. And how did you obtain that knowledge?

A. Mr. Allen advised me of it.

Q. Did you have some discussion with Mr. Allen about the writing of that check?

A. We discussed at various times the various checks that had been written from time to time for gambling indebtedness, yes.

Q. Some of them had been written by you?

A. Some by me and some by him.

Q. And this particular check, you recall discussing it?

A. We discussed this check. There was a check of mine on or about that time for $5,000, a gambling check. That was also discussed.

Q. Mr. Keane, do you recall a trust agreement that was entered into in the summer of 1947?

A. Yes.

Q. And do you have a—I'll show you——

A. I have an original here. I don't know whether that's an original or not.

Q. Is that a copy of the original, and I'm showing you Plaintiff's 129?

A. The one that I have here in my hand is an original of the agreement that Mr. Allen and I entered into in August of 1947. I don't know whether——

Q. Now, the one that you have in your hand that you have referred to as an original has in addition to the five pages referred to as trust agreement, a seven page instrument headed "Agreement" is that correct?

(Testimony of Francis Clayton Keane.)

A. That was entered into between Mr. Allen and myself. That is a copy, I think, of the trust agreement.

Q. Do you have any objection to our substituting——

The Court: Why don't you call that another exhibit, and then you can withdraw 129? [1256]

Mr. Stocking: All right.

(Whereupon, trust agreement and agreement were marked Plaintiff's Exhibit No. 130 for identification.)

Mr. Stocking: We'll offer 130 in evidence, and withdraw 129 if it is accepted in evidence.

Mr. Etter: To which we have no objection on either the withdrawal or the admission of the exhibit.

The Court: Exhibit 130 admitted, no objection. Exhibit 129 withdrawn.

(Whereupon, Plaintiff's Exhibit No. 129 was withdrawn.)

(Whereupon, Plaintiff's Exhibit No. 130 for identification was admitted in evidence.)

Q. (By Mr. Stocking): Now, I notice that in the trust agreement which is the second agreement in exhibit 130, that on the second page the amount of the indebtedness has not been filled in.

A. That is correct; it wasn't at the time the contract was prepared.

(Testimony of Francis Clayton Keane.)

Mr. Stocking: Mr. Towles has the figures that appear, now.

The Court: Well, if you can stipulate as to those figures.

Mr. Stocking: Do you have any objection to the figures [1257] being filled in on your copy of the agreement, Mr. Keane?

A. (The Witness): No.

The Court: If they're filled in I would suggest that if Mr. Towles fills them in that he initial the insertions. It may become important sometime.

Mr. Stocking: Now, on the blank spaces on page 2 of Exhibit 130 Mr. Therrett Towles, one of the attorneys for the defendant Allen, has filled in the figures as follows: The paragraph reads "The indebtedness for the payment of which this trust is created to the Pilot Silver Lead Mines, Inc., is" and the figures filled in by Mr. Towles were "$73,-664.33," and continuing, reading paragraph 1, "and to the Lucky Friday Extension Mining Company is," Mr. Towles has filled in the figures "$95,122.72" then the paragraph continues "as determined by the audit of the books and records" and Mr. Towles has initialed "T.T." on the margin, "6/16/49" indicating the date.

The Court: Is it agreed and stipulated by both sides that Exhibit 130 may have such figures filled in?

Mr. Etter: It is, your Honor.

The Court: And Mr. Stocking?

(Testimony of Francis Clayton Keane.)

Mr. Stocking: Yes.

The Court: All right.

Q. (By Mr. Stocking): There was some testimony as to who was to [1258] furnish the securities which were to go into the trust account and be sold for the purposes of this trust. I'll ask you with respect to these securities if you can tell me who was to furnish these securities: Coeur 'dAlene Consolidated Silver Lead Mines, Inc., 525,000 shares?

A. Who was to furnish that? Mr. Allen. I think that the contract speaks for itself, doesn't it? I think it so provides.

Q. You're talking about the agreement——

A. ——that was entered into between Mr. Allen and myself, yes. I was to put up 100,000 shares of Pilot stock, which I did, and I think that's the only contribution that I made in connection with that settlement, although I possibly could be in error on it, but that's my recollection.

Q. "This agreement made and entered into this 4th day of August, 1947, by and between F. C. Keane, of Wallace, Idaho, party of the first part, and J. A. Allen, of Spokane, Washington, party of the second part, Witnesseth: Whereas, the parties hereto are parties plaintiff and defendant in an action in the District Court of Shoshone County, Idaho, being No. 10224, involving their rights in certain mining stocks and properties which have become involved in certain possible liabilities; and Whereas, disputes and differences have arisen be-

(Testimony of Francis Clayton Keane.)

tween the parties hereto resulting in various claims and demands made by each party hereto [1259] against the other party; and Whereas, although the second party denies the claims and charges made by first party against second party in the complaint in said action, it is the desire and intent of the parties hereto to settle all disputes, differences, claims and demands, and to accomplish a full, final and complete settlement of them between the parties,

Now, therefore, the parties hereto, in consideration of their mutual covenants and agreements as hereinafter set forth, do hereby and by these presents promise, covenant and agree as follows: 1. A proposition has been submitted to the Independence Lead Mines Company, a corporation, to satisfy and discharge the indebtedness of said corporation in the approximate sum of $150,000 claimed by said Independence Lead Mines Company to be owing by the Lexington Mining Company, Lexington Silver-Lead Mines, Inc., Montana Leasing Company, and other corporations and individuals, by the delivery to said Independence Lead Mines Company of certain stocks, cash, and a production note as hereinafter mentioned, upon certain promises and conditions, which proposition has been accepted by Independence Lead Mines Company. In fulfillment of said proposition, said second party promises and agrees to cause to be delivered to Independence Lead Mines Company $5000 in cash on or before August

(Testimony of Francis Clayton Keane.)

6, 1947, $7500 in cash on or before [1260] October 1, 1947, both of said payments to be made by or on behalf of Lexington Silver-Lead Mines, Inc.; A production note payable by Lexington Silver-Lead Mines, Inc., in the sum of $87,500.00; 100,000 shares of Pilot Silver-Lead Mines, Inc.; 400,000 shares of Lexington Silver-Lead Mines, Inc.; 100,000 shares of Coeur d'Alene Consolidated Silver-Lead Mines, Inc.; 100,000 shares of Hunter Silver-Lead Mines, Inc.; 100,000 shares of Alma Mining Company (to be incorporated)."

Now, do you know whether that part of the agreement was executed by Mr. Allen?

A. I would want to go over those figures. There was certain stock put up. There was a delivery of 200,000 shares of Consolidated, that is Coeur d'Alene Consolidated, to me, and I don't know what other matters Mr. Allen took care of.

Q. All right; now paragraph 2 relates to this trust agreement which is attached, and which was previously Exhibit 129: "The parties hereto, as Trustors, have entered into a trust agreement dated August 4, 1947, a copy of which is attached to this agreement and by reference made a part hereof. Second party promises and agrees to cause to be delivered to the Trustees as specified in said trust agreement, $8000 by B. W. Porter, and $25,000 by Coeur d'Alene Consolidated Silver-Lead Mines, Inc. and all of the stocks listed and described in said trust agreement, [1261] except 100,000 shares of

(Testimony of Francis Clayton Keane.)

stock of Pilot Silver-Lead Mines, Inc., which shall be transferred and delivered to said Trustees by first party." And that was the 100,000 shares you stated was your obligation?

A. That is correct. I turned that over to the trustees.

Q. With respect to the delivery of the stock by the second party, was there any discussion as to the sources of that stock?

A. Well, it was to come out—no, there wasn't with me. Now, I did not engage in any discussions with reference to that contract, myself.

Mr. Etter: Now, just a minute——

A. My attorneys were making the contract for me.

Mr. Etter: Well, now, at this time, as far as any detailed examination of the contract, in view of the testimony of the witness that he didn't participate in any of the negotiations, I'm going to move to strike any testimony having to do with any interpretation of the agreement, other than the contract, which speaks for itself. I didn't know that.

The Court: Well, he's only testified to one thing; he says he turned over 100,000 shares of Pilot; as to the rest he says the contract speaks for itself. Now, what is there to strike?

Mr. Etter: If that's all that's material, I'll [1262] withdraw the motion. I thought there was some discussion of the terms.

The Court: Well, it's understood that Mr. Keane

(Testimony of Francis Clayton Keane.)

says he personally didn't discuss the terms of this contract, his attorney did, that it was his recollection that he was to turn over 100,000 shares of Pilot, and that he did, and that it was his opinion that the contract called for Allen to turn over the rest of the stock.

Mr. Etter: And I think the witness stated he wasn't present during the negotiation.

A. That is correct.

Q. (By Mr. Stocking): Do you know whether all the stock required to be turned over to the trustees by the trust agreement has been turned over?

A. Well, I'd have to base my answer on hearsay, necessarily.

Mr. Etter: I'll object.

The Court: Sustained.

Q. Do you have any recollection of the checks making up Plaintiff's 8-e-1?

The Court: That's already admitted, is it?

Q. Yes.

A. They are checks drawn on the Montana Leasing Company account.

Q. Yes; I asked you if you had any recollection of those particular checks? [1263]

A. No.

Q. You don't know, then, for what purpose they were drawn?

A. Well, I probably do, yes, but my answer would be founded on hearsay again.

(Testimony of Francis Clayton Keane.)

Q. I see. A. What I was told.

Q. Were you told by Mr. Allen?

A. I don't recall that he mentioned those particular items.

Q. Or by anybody in his presence?

A. Not that I recall of.

Mr. Stocking: That's all.

Mr. Etter: That's all.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Stocking: That's all the witnesses we're going to call, if the Court please.

The Court: The government rests?

Mr. Stocking: Yes.

Mr. Etter: One witness to recall.

The Court: All right, sur-rebuttal.

JAMES ANTHONY ALLEN

the defendant, recalled as a witness in his own behalf, in sur-rebuttal, resumed the stand and testified further as follows:

Direct Examination

By Mr. Etter:

Q. I'm going to hand you this, marked Plaintiff's 127, Mr. [1264] Allen; you recognize that?

A. I do.

Q. And the date? A. March 31, 1946.

Q. All right, where were you—were you there at the time this check was cashed?

A. I was; there was Leon Goodman, who was

(Testimony of James Anthony Allen.)

running Mike's Trading Store here in Spokane, my wife, and myself.

Q. And what did you do with this check?

A. I got cash for part of that, and I had got part the week before, and that paid the entire bill.

Q. And was there any gambling by you or your wife or Mr. Leon Goodman at that time?

A. Not one penny.

Q. And did you ever have a discussion with Mr. Keane about this check as he's testified?

A. Never did.

Mr. Etter: That's all.

Mr. Erickson: No questions.

(Whereupon, there being no further questions, the defendant was excused as a witness and resumed his place with his counsel.)

Mr. Etter: That's all, your Honor; the defendant rests.

The Court: The defendant rests; the government [1265] rests?

Mr. Stocking: The government rests.

The Court: Both parties rest.

Mr. Emigh: We have a motion, your Honor.

The Court: Yes, I appreciate that.

* * *

(Whereupon, the following proceedings were had without the presence of the jury and one alternate juror.)

The Court: All right, the jury has retired; you may proceed.

Mr. Emigh: May it please the Court, at this time the defendant James Anthony Allen presents to the court, and for convenience, in writing, a motion for judgment of [1267] acquittal, a copy of which will be delivered to the reporter, and we ask that it be made a part of the record of this case.

(Reporter's Note: Defendant's motion for judgment of acquittal is included in the clerk's transcript of pleadings in this case.)

The Court: The court has received a written motion for judgment of acquittal on behalf of the defendant Allen as to each of the seven counts. The court has noted the same, and has particularly noted the further reason that count seven should be dismissed upon the ground that Mr. Keane's testimony and character is such that the court is to have the jury completely disregard it, and is further to dismiss such charge against the defendant Allen. Said motion and each and every paragraph thereof is overruled and denied. Exception allowed. In the first instance, as far as the witness Keane is concerned, it's for the jury to determine, and not for me to determine, whether he told the truth, and the jury has a right to believe Mr. Keane and to disbelieve Mr. Allen. There has been much presented in this case that corroborates Mr. Keane and that disputes and contradicts Mr. Allen. Some juries might believe Mr. Keane and say that regardless

of his grave and serious errors and mistakes, that after he took the stand he told the truth. Other juries, and perhaps [1268] this jury, may not believe Mr. Keane at all, or may doubt sufficiently some of his testimony as to feel unable to separate the truth from the false, in which event the jury will be entitled to disregard entirely the testimony of Mr. Keane. However, in this case if Mr. Keane had chosen not to plead nolo contendere, and Mr. Keane was still here in this case as a defendant with Mr. Allen, and pleaded not guilty, and if Mr. Keane had determined not to take the stand, as would have been his right, and to have been completely silent, without the evidence of Mr. Keane at all there would have been enough to have taken the guilt or innocence of both and each, Mr. Keane and Mr. Allen, to the jury, and I'm satisfied that if Mr. Keane had pleaded not guilty and had refused to take the stand, and if nobody had the benefit of his evidence, that that would not have necessarily acquitted either Mr. Keane or Mr. Allen.

In other words, the circumstances of this case and the evidence in this case is sufficient to take the case to the jury against Mr. Allen, as I see it, completely disregarding and eliminating the testimony of Mr. Keane from the case. I have no right to eliminate and disregard that. He was under oath. Concededly much of what he testified was the truth; much of what he testified to was conceded or admitted by Mr. Allen. It may be that [1269] the portion that Mr. Allen denied was also the truth.

On the other hand, of course, Mr. Allen may have spoken the truth as to every discrepancy between him and Mr. Keane. That is the province and responsibility of the jury, but I think I should make clear to counsel that this jury, if it's convinced beyond all reasonable doubt of Mr. Allen's guilt from the other testimony in the case, completely disregarding the testimony of Mr. Keane, if they see fit to do so, would be entitled to convict Mr. Allen if the jury by virtue of the other testimony exclusive of that of Mr. Keane is convinced beyond all reasonable doubt of the guilt of Mr. Allen on one or more of the seven counts, including count seven, the conspiracy count; but aside from whether or not there is enough evidence without Mr. Keane, Mr. Keane's evidence is before the jury, and the jury has the right to accept it if it believes it; it has the right to reject it if it disbelieves Mr. Keane's testimony or believes that he intentionally testified falsely as to any material portion of his testimony, so the exception is noted. Now, are there any other motions?

Mr. Emigh: We have no further motions.

* * *

(Whereupon, at 5:25 o'clock p.m., the Court took a recess in this cause until Friday, June 17, 1949, at 9 o'clock a.m.) [1274]

Friday, June 17, 1949, 9 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

(Whereupon, in the absence of the jury and one alternate juror, a further conference was held between the court and counsel and the defendant concerning the instructions proposed to be given to the jury.)

(Without objection, Defendant's Exhibits for identification D and K were withdrawn, upon motion of the defendant.)

(Whereupon, the following proceedings were had without the presence of the jury and one alternate juror.)

The Court: Now, we have something else, gentlemen. With respect to Exhibit 9 for identification, which is a large amount of slips beginning for the Montana Leasing Company in 1943, I admitted in evidence 9-a thereof, beginning June 14, 1945. The portion before June 14, 1945, has never been separated. Is there any reason that that portion of 9 preceding 9-a should not be eliminated so that it doesn't go to the jury?

Mr. Stocking: That would be satisfactory.

Mr. Etter: Satisfactory. [1275]

The Court: All right, it will be so eliminated. The jury may come in.

(Whereupon, the following proceedings were had within the presence of the jury and one alternate juror.) [1276]

* * *

(Whereupon, counsel for the plaintiff and for the defendant presented their final arguments to the jury.)

(Whereupon, the following proceedings were had without the presence of the jury and one alternate juror.) [1281]

* * *

(Whereupon, the following proceedings were had within the presence of the jury and one alternate juror.)

COURT'S INSTRUCTIONS TO THE JURY

The Court: Members of the jury, you've heard the evidence in this case and the argument of counsel on both sides. You've now reached that stage in the trial where it's my duty to instruct you as to the law, and it's your duty to listen carefully to the instructions that I give you.

In Federal court the instructions are what are known as oral, that is, they're oral to you. You will receive no copy of what I say. They're oral to counsel; they likewise only know actually what the instructions are when they hear them spoken. They may be oral or written as far as I'm concerned. Frequently the instructions I give are entirely oral. While I think the language is not so excellent, I've sometimes thought that people understand better what's spoken than what is read. In some cases I give the instructions entirely from writing. In other cases, as you will find in this case, I combine some speaking, as I am now doing, and some writing, as [1284] I will later do, but again to you they are oral. You can only take to the jury room your recollection of the instructions as you hear them.

The instructions are vital. They are intended to and must guide you in your consideration of the evidence. They're to give you the law applicable in this case.

This is an important case. All cases are important to the parties involved. This case is important to the government. It is important to the defendant. It is important to the public. It is important to you as jurors, because you're interested under your oaths and by virtue of your duty as jurors of returning the correct verdict in each instance on the merits under the law and the evidence, free from sympathy for anyone, and free from prejudice against anyone. After I've instructed you you will upon direction retire to the jury room to consider of your verdicts as to the seven counts with respect to the defendant James Anthony Allen.

The grand jury has returned an indictment against the defendants James Anthony Allen, Francis Clayton Keane, and Joseph Valentine Grismer. The defendant, Francis Clayton Keane, has pleaded nolo contendere to each of the seven counts. The defendant, Joseph Valentine Grismer, has pleaded nolo contendere to count 7, the conspiracy count, and the first six counts were dismissed as to him. The disposition of the case as to those two defendants will be determined by the Federal Judge before whom they appear for sentence. It is expected that that Federal Judge will be Judge Driver, he having been the judge before whom those two pleaded nolo contendere. The defendant James

Anthony Allen having pleaded not guilty to the indictment and each of the seven counts, is now on trial before you and you are now concerned in this case as to the guilt or innocence of the defendant, James Anthony Allen.

Inasmuch as the defendant Allen, who is now on trial before you, entered a plea of not guilty to the indictment and each count thereof, that means that he denies every material allegation in the indictment, which places upon the government the burden of proving beyond a reasonable doubt every essential, material allegation as to each of the seven counts.

It is your duty and I am confident that you will do your duty as jurors under the oath you've taken to conscientiously and seriously return a true verdict as to each of the seven counts under the evidence and these instructions. You can readily understand that the government can only be maintained by the impartial enforcement of the law. You as jurors are not concerned with whether or not the laws here involved ought to have been enacted, nor are you concerned with any penalty or punishment which may be imposed under the statutes in this case in the event a verdict of guilty under one or more of the seven counts is returned against the defendant Allen. You are simply concerned with returning the correct [1286] verdict of guilty or not guilty as to each of the seven counts. In the event there is a verdict of guilty the responsibility will be mine, and in the event the sentence I should

impose would be too heavy, it would be my error and not yours. In the event I should be too lenient, the mistake would be mine, the fault mine, and in no wise yours. It is not the policy of the law that a verdict of guilty should be returned against anyone on trial unless such verdict is supported by the evidence beyond a reasonable doubt, but it likewise is against public policy that any guilty person should escape conviction if the evidence establishes beyond all reasonable doubt that he is guilty as charged.

It is my duty to instruct you as to the law governing this case, and it is your duty to take the law from me and accept that to be the law as stated to you by me, notwithstanding any statement or contention of any attorney as to what the law is or ought to be, and despite any opinion of your own that the law is different or ought to be different than I state it to you to be. The mere fact that you may not have favor for any particular law, or laws, cannot rightfully be by you permitted to influence you at all in arriving at a verdict as to any of the seven counts here involved.

You are instructed that the law in an American court presumes every defendant in every trial and as to every type of charge to be innocent until he is proven guilty by the [1287] evidence beyond a reasonable doubt. This presumption is not a mere matter of form, but is a substantial right of every defendant in every case, as well as a substantial part of the law of the land, and it continues throughout the entire trial and until the jury finds that this

presumption has been overcome by the evidence beyond a reasonable doubt. If after the jury has considered all the evidence produced, it then is convinced beyond all reasonable doubt that the defendant is guilty as charged, then the presumption of innocence is overcome by the proof of guilt, and such presumption of innocence disappears from the case, and it becomes the duty of an honest jury to return a verdict of guilty.

The indictment filed in this cause is merely the method provided by law whereby the United States, through a grand jury, and on behalf of the people, shall accuse or charge one or more persons of violation of the criminal laws of the United States, and whereby the one or ones accused shall be informed of the accusations against him or them that he or they may defend against such. The fact that an indictment has been found and returned by the grand jury gives rise to no inference whatsoever that the defendant Allen is guilty of any offense mentioned in these instructions or mentioned in the indictment. The guilt of any defendant who pleads not guilty can only be established by proof at the trial of his guilt beyond all reasonable doubt, and such proof must be by [1288] the evidence; the indictment is not the slightest evidence at all.

The instructions which I am giving you are merely the method provided by law whereby the Court shall advise you of the law applicable to this case. These instructions must guide you in the consideration of the evidence and in the determination of what your

verdicts as to each of the seven counts shall be. These instructions are to be by you understood, interpreted, and applied as a connected body and as an entirety. You will disregard any statement made by counsel on either side of this case as to what any testimony has been unless borne out by your final recollection thereof. You are, likewise, to disregard any testimony which may have been stricken by the Court, and you must, likewise, disregard any question or answer thereto to which the Court sustained an objection.

You've been told that the evidence must establish the guilt of a defendant in an American court as to every charge beyond all reasonable doubt. Therefore it is important that I advise you as to what is meant by proof beyond all reasonable doubt. Proof beyond all reasonable doubt does not necessarily mean that the evidence shall establish the guilt of the defendant beyond all possible doubt. The law does not require absolute certainty of guilt before there can be a verdict of guilty at the hands of a jury. While the law does not require proof of guilt to an absolute certainty, or beyond all possible [1289] doubt, the law does require proof of the guilt of the defendant beyond all reasonable doubt before there can be a conviction. The expression "reasonable doubt" means in law just what the words imply—a doubt founded upon some good reason. A reasonable doubt must arise from the evidence, or lack of evidence. Neither sympathy nor the desire of a jury to avoid performing a dis-

agreeable duty constitutes a reasonable doubt. Neither a mere whim nor a vague, conjectural doubt founded upon mere possibilities, but not founded on reason, constitutes a reasonable doubt. A reasonable doubt is such a doubt as a sensible, honest-minded man or woman would reasonably entertain in an honest and impartial investigation to ascertain the truth about a matter as important and serious as are the matters involved in this trial.

In order to warrant conviction as to the seven counts, or any of them, the evidence need not be so strong as to exclude all doubt or possibility of error, but in order to warrant conviction as to any count, the evidence as to such count must be strong enough to exclude all reasonable doubt, that is, strong enough to exclude all doubt based on reason. If, after considering all the evidence in this case, you can say that such leaves in your mind a firm, conscientious and abiding conviction of the guilt of the defendant James Anthony Allen as to any count or counts, then you are convinced beyond a reasonable doubt of the guilt of said defendant as to said [1290] count or counts, and then it would be your duty to find said defendant James Anthony Allen guilty as to such count or counts. On the other hand, if after considering all the evidence in the case you do not have a firm, conscientious and abiding conviction of the guilt of the defendant James Anthony Allen as to any count or counts, then you have a reasonable doubt as to such count or counts and then it would be your duty to find

said defendant not guilty as to such count or counts. Proof beyond all reasonable doubt has frequently been defined as "proof to a moral certainty", but, while the proof must be strong enough to constitute a moral certainty of the guilt of the defendant on trial, it need not be strong enough to constitute an absolute certainty.

The indictment in this case is brought under three different statutes, namely, the so-called mail fraud law, the National Securties Act, and the conspiracy statute. The first three counts charge violation of the mail fraud law, Section 338, Title 18, United States Code, which, as far as now material, reads as follows:

"Whoever, having devised, or intended to devise, any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be [1291] placed any letter, postal card, package, writing, circular, pamphlet, or advertisement * * * in any post office, or station thereof, or street or other letter box of the United States, or authorized depositary for mail matter to be sent or delivered by the post office establishment of the United States, or shall knowingly take or receive any such therefrom * * * or shall knowingly cause to be delivered by mail according to the directions thereon * * *"

shall be punished as therein provided.

The next three counts, counts 4, 5 and 6 of the indictment, charge a violation of Section 17-A of the Securities Act of 1933 as amended, being Title 15, United States Code, Section 77-q. This section reads as follows:

"It shall be unlawful for any person, in the sale of any securities, by the use of any means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly * * * to employ any device, scheme or artifice to defraud."

In the seventh count of the indictment it is charged that there was a conspiracy by the defendants Allen, Keane and Grismer and other persons to the grand jurors unknown, to commit violations of both the mail fraud law and of the [1292] securities act, including the violations charged in the first six counts, as well as other violations not necessarily charged in the first six counts. The conspiracy statute as far as this case is concerned reads as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy"
is guilty of conspiracy.

With respect to counts 1, 2 and 3 of the indictment charging violation of the mail fraud law, you will note that the offense as described by the statute

I just read a little while ago to you consists of two parts, first, a scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, and secondly, some particular act of using the United States Mails for the purpose of furthering or executing such scheme or artifice.

Count 1 charges that the defendant Grismer along with defendants Keane and Allen employed the scheme to defraud, and charged that for the purpose of executing this scheme and attempting so to do, the defendants on or about September 20, 1945, caused a letter to E. J. Gibson and Company, 5 Wall [1293] Street, Spokane, Washington, to be sent by the post office establishment of the United States.

Fraud alone against the public is not punishable under Federal law. It is only when the mails are used in some way in connection therewith that the Federal government can prosecute. After a fraudulent scheme has once been put into operation each letter or other article of mail matter placed in the mails or received through the mails in furtherance of the scheme, or caused to be delivered by mail to the addressee in furtherance of such scheme, is a separate offense. An indictment could charge as many counts of violation of the law as there were acts of mailing or using the mails in the operation of the scheme. The indictment in this case charges in addition to the letter mentioned in count 1, the letter mentioned in count 2 addressed to Ben Red-

field at Spokane, Washington, on June 13, 1946, and in count 3, the letter addressed to E. J. Gibson at Spokane, Washington, on May 25, 1946.

It is your duty as jurors to decide as to the defendant Allen first, whether there was such a scheme devised, conducted, joined in or participated in by the defendant Allen, and secondly, whether the letters described in each of the first three counts above mentioned were mailed pursuant to the scheme and for the purpose of executing and furthering same as alleged in the first three counts of the indictment. It is not necessary that you find that the evidence proves beyond [1294] all reasonable doubt that all of the elements of misrepresentation have been proved as to the defendant Allen, but it is sufficient in order to bring in a verdict of guilty as to counts 1 to 3 that you believe from the evidence beyond all reasonable doubt that the defendant Allen made or participated in the making of one or more of the essential acts or representations which I will later set forth, and that he made or participated in the scheme, and that the mails were used.

If the evidence fails to establish such essential elements which I will later more particularly advise you concerning, beyond all reasonable doubt, then it will be your duty to acquit the defendant Allen of the charges contained in counts 1 to 3 inclusive, or such ones of those three concerning which you have a reasonable doubt.

Counts 4, 5 and 6 of the indictment charge a

violation of Section 17-A of the Securities Act of 1933, which I have previously read to you so far as applicable to this case. These counts charge that the defendants employed the scheme to defraud described in the first count, and used such scheme as described in the first count in the sale of securities as charged in counts 4, 5 and 6 by the use of the United States mail. The Securities Act makes it an offense to employ such a scheme to defraud directly or indirectly in the sale of a security, and a security within the meaning of this law includes stock certificates in a mining company. In order that [1295] you should find the defendant Allen guilty of the offenses charged in counts 4, 5 and 6, you must find from the evidence beyond a reasonable doubt that the defendant Allen devised or helped devise or joined in or participated in the essential part or parts of a scheme to sell securities in interstate commerce or through the use of the mails, directly or indirectly, that such scheme was fraudulent, and that a device, scheme or artifice to defraud was employed by the defendant, and as to these three counts, counts 4, 5 and 6, the essential parts of such scheme or artifice in order to justify conviction will later be stated to you.

Just the same as with the mail fraud counts, it is not necessary that the evidence prove beyond all reasonable doubt each and all of the elements of misrepresentation set forth in the security fraud counts, and as referred to in count 1 of the indictment as to the defendant Allen to warrant a verdict

of guilty as to these security fraud counts, but it is necessary to justify conviction as to any of said security fraud counts that the evidence establish beyond all reasonable doubt that the essential elements of said three security fraud counts with respect to the defendant Allen is proved in accordance with the instructions I will later give you as to what the essential elements to permit conviction are.

Count 4 charges the use of the mails on August 8, 1945, to Edwin LaVigne of Spokane, Washington. Count 5 charges the use [1296] of the mails on May 28, 1946, to E. J. Gibson of Spokane, Washington, and count 6 charges the use of the mails on June 12, 1946, to Edwin LaVigne of Spokane, Washington, for the purpose of selling securities in interstate commerce. In these counts likewise it is not necessary that the defendant Allen himself used the mails if you find that the defendant Allen participated in the scheme or device to defraud knowing that the mails would be used by other co-defendants or employees in the perpetration of such scheme.

Count 7 charges a conspiracy among the three defendants named. The conspiracy statutes as passed by Congress and interpreted by the courts provides that when two or more persons enter into a conspiracy or combination to commit any offenses against the United States, all acts done by any of them during the life of the conspiracy in furtherance of and to effect the objects of the conspiracy and unlawful agreement are chargeable to all of

them. Such refers only to acts and statements made by the participants in the conspiracy and during the life and operation thereof. Anything done by any party either before the conspiracy began or after it ended will not be chargeable to anyone other than the party himself. However, it is a part of the law that when a criminal scheme or conspiracy is in operation, a person joining it at any time thereafter with knowledge of such criminal scheme or such criminal conspiracy becomes a co-conspirator, and if it [1297] was previously only a scheme of one individual, by joining it he changes such to a conspiracy as well as continuing it as a scheme.

In the present case, and with respect to statements and activities of the defendant, the question therefore is first, whether there was in operation a conspiracy or unlawful agreement or understanding among the defendants named in the indictment or some of them to violate the mail fraud law or the Security Act as charged in the indictment. If you find beyond a reasonable doubt that Allen participated in such, whether from the beginning or later during any portion of the period charged, then anything he did in furtherance of such conspiracy would be chargeable to him and likewise anything that the other defendants or either of them did during the progress of such conspiracy while Allen was a member would be chargeable to Allen. This relates particularly to count 7 of this indictment, but as will be further stated, a scheme to defraud

when the scheme is conducted by two or more persons is in substance and effect also a conspiracy. Such principle holds true with respect to counts 1 to 6 inclusive of this indictment, which charge a violation of the mail fraud statute as to the first three counts and a violation of the National Securities Act as to the last three, providing you find beyond a reasonable doubt from the evidence that the defendant Allen participated with Keane and Grismer or either [1298] in connection with any such criminal scheme or conspiracy as charged.

Conspiracy may be established by circumstantial evidence or by deductions from facts. Common design is the essence of the crime of conpiracy, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together by common or different means, but if leading to the same unlawful result. If the parties act together to accomplish something unlawful a conspiracy is shown even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and actually unkown to the others. It is not necessary for the government to prove that the defendant Allen mailed any of the letters referred to in counts 1 to 6 of the indictment, or in count 7 of the indictment, if a fraudulent scheme were devised as alleged in the first 6 counts or a conspiracy was formed as alleged in the seventh count and if the defendant Allen participated therein knowing that in reasonable probability the mails

would be used for the purpose of aiding in the consummation of the scheme or the conspiracy, or if letters were mailed with the approval, knowledge or acquiescence of the defendant Allen, or if the defendant Allen knew that they would probably be or customarily be mailed by some other person in carrying out the scheme to defraud, even if they were mailed by a perfectly innocent person then the [1299] defendant Allen if there was actually such mailing would be just as guilty as if he had personally mailed the letter or letters himself.

The mail matter charged to have been mailed or delivered by mail in furtherance of a scheme to defraud may be, and frequently is, as perhaps it may seem in this case, entirely innocent on its behalf as far as its actual contents are concerned. Such mail matter need not be by itself effective to carry out the scheme, and need not be actually calculated to do so. It need not contain any misrepresentations or disclose any fraudulent purpose or show on its face that it was in furtherance of any scheme or artifice to defraud, but the mail matter mailed must have some relation to and be a step in the attempted execution of the scheme or conspiracy, and such mail matter must be mailed or caused to be mailed with intent to aid and further the purpose of the scheme or conspiracy.

Fraud within the meaning of the postal laws of the United States may be any trickery or deception, any false pretenses, representations or promises for the purpose of obtaining money or property of

another. This is true even when the persons resorting to such means intend to repay what they have obtained and intend to pay it without loss to the person or company at a later date, and even though the people who resort to such means intend to pay with interest or even profit or perhaps a bonus. It is not a good defense in a case of this sort that the defendants had confidence in the ultimate success of other mining enterprises other than the corporations in which stock was issued, and intended at some future date to repay any diverted money to the corporations from other sources, and that they expected ultimately to save the investors in the Pilot and Extension companies or either of them from loss, and even make a profit for them; if they intended to obtain the money or property of others by means of false representations or promises, there would be a violation of the law by the one so intending. The people to whom the money belonged were the ones who had a right to decide whether they wished the money diverted. They're the ones who had a right to say whether or not they wished to run such risk as there might be as to a bonus, profit, interest or future repayment.

Monies obtained from investors for the development of a particular mine upon a promise or representation that the particular mine will be developed by use of such funds must be used for that particular mine, and any diversion of money to a foreign purpose, however, meritorious that purpose

may be believed to be by the defendants, is a wrongful and criminal diversion.

The devising of an unlawful and fraudulent scheme or artifice is an act of the mind. You cannot possibly enter into any defendant's mind and by reason of such physical [1301] visitation determine his intention or purpose. The evidence of intent to devise and conduct such a scheme to defraud may be shown and usually must be shown by the acts and declarations of the parties concerned, and by the attendant circumstances as well as by direct evidence when direct evidence is available. Experience shows that positive proof of fraudulent intent is not generally to be expected. For that reason, among others, the law permits a resort to circumstantial evidence as a means of ascertaining the truth.

In order to constitute the offenses charged in this indictment it is not necessary to show that the defendants intended to defraud every person with whom they may have had dealings, or that the entire course of the transaction was a fraud. It is not necessary to show that all the monies of the companies were diverted. No defendant would have the right to represent that all the money was to be used for the development of a certain company, and then divert only five per cent or one per cent; neither is it necessary to show or prove that the scheme or artifice or the conspiracy was all developed at one time. It may have been formed gradually.

There will now be a recess for five minutes.

(Short recess)

(All parties present as before, and the trial was resumed.)

The Court: I realize, ladies and gentlemen of the jury, [1302] that the instructions, which are far from completed are long and difficult. The charge is complicated. There's seven counts, but if the defendants are guilty beyond all reasonable doubt they have no right to complain because they're charged with the complications which if they're guilty they constructed.

With respect to the several features of the scheme to defraud described in the first count of the indictment, you are instructed that it is necessary for the government to prove beyond a reasonable doubt at least some of the essential false pretenses, representations or promises therein charged and which I will later specify to you, were actually made. It is not necessary that all the allegations of the indictment be proved. However, it may all be proved. The government is only obligated to prove the essential ones. A scheme to defraud may be effected by one material misrepresentation, although where more are charged they may all be proved, but they need not all be proved.

To find the defendant Allen guilty of the offenses charged in any of the counts of the indictment it is not necesary to find that he committed personally all of the acts charged in such count or counts. The

law holds that anyone who knowingly aids, abets or counsels in the commission of a crime for the purpose of aiding such commission is legally as guilty as if he individually perpetrated the entire crime himself. One may join a conspiracy after it has been formed, or [1303] may join a scheme of one individual and thereby not only continue it as a scheme, but also make it a conspiracy, and if he participates knowingly for the purpose of aiding in the commission of a crime, he becomes a party thereto and is responsible just as though he was the one who originally conceived and planned the entire plan or conspiracy. One actor may drop out of a conspiracy and the others continue, or a new one may join, without the conspiracy terminating.

As I've already told you, a conspiracy may be proved either by direct or circumstantial evidence. It is not unusual for it to be proved by the use of circumstances. Men who agree to violate the statutes of the United States do not very often call in a stenographer and prepare a written agreement to that effect, or if they do, they do not usually make it available to any investigators. For this reason the law says that in a conspiracy case the government may be permitted to present its case on what the law calls circumstantial evidence. That is what the government is striving to do here. It contends that certain things happened and certain events occurred. It contends these could not have happened by mere coincidence unless there was an agreement or concert of action between at least two of the de-

fendants, therefore it asks you as the jury to consider that there must have been a conspiracy. The government has the right to so contend, yet when it does ask for a conviction on circumstantial evidence, then it has [1304] the burden not only of proving the facts and circumstances beyond all reasonable doubt, but it must also satisfy you beyond all reasonable doubt that such circumstances are only consistent with guilt. You must believe before you can find any defendant guilty in this cause that the circumstances proved as to him exclude all possibility, exclude all reasonable possibility of his innocence, and that after considering all the inferences reasonably to be drawn from the circumstances, your sound judgment requires you to reject other inferences and accept only the inference of guilt.

The law requires that you study all the evidence and that you weigh carefully the conclusions or the inferences favorable to the defendant as well as those unfavorable. The witnesses Francis C. Keane and Joseph V. Grismer in this case are confessedly what is known in law as accomplices. The fact that a witness is what is known as an accomplice doubtless operates and ought to operate largely against the credibility of his testimony, but the jury is not bound to reject such testimony merely because the witness is an accomplice. Accomplices are competent witnesses. Frequently the only proof of law infraction has to be through an accomplice or accomplices. It is your duty to consider the testimony of

Mr. Keane and Mr. Grismer and each of them, but in so doing you should weigh the testimony of each and scrutinize the testimony of each with great care. You are to test the truthfulness of each of them by inquiring into the probable motives which prompted their testimony, and are to decide to what extent such motives might have colored or warped it. You are to look into the testimony of other witnesses in the case for corroborating facts or circumstances; where the testimony of an accomplice is supported in material respects by trustworthy evidence or by the facts and circumstances which you find to have existed beyond a reasonable doubt, then you ought to credit the testimony of an accomplice, but where the testimony of an accomplice is unsupported and uncorroborated, you should not rely upon it unless after the exercise of great care and careful scrutiny it produces in your minds beyond all reasonable doubt the conviction of its truth, and in such event, if you believe the testimony of an accomplice to be true beyond all reasonable doubt, you're justified in convicting upon the testimony of that accomplice without any corroboration at all.

You are the exclusive judges of what is the evidence in this case and of the weight and credit to be given the testimony of each witness. In doing this you should take into consideration the conduct and demeanor of the witness while testifying, his or her apparent candor and frankness or lack of such qualities, the reasonableness or unreasonableness of his or her testimony, its probability or im-

probability as measured by your common experience in life, the opportunity on the part of any witness of knowing or being informed concerning the matters about which he testifies, his intelligence or her intelligence or lack of intelligence, any prejudice or bias disclosed by him or her, any motive in your judgment which would cause him or her to warp or color the testimony one way or the other, and the interest, if any, which he or she may have in the outcome of the case.

If you find that any witness in the trial of this cause either for the government or for the defendant has willfully, that is, intentionally and knowingly testified falsely as to any material fact, that is, as to any fact important in the case, then you are at liberty to disregard his or her entire testimony except insofar as such testimony is corroborated, that is, supported, by other testimony which you accept as worthy of belief, or as corroborated, that is, supported, by the facts and circumstances which you find to have existed under the evidence. These rules as to the testing of the testimony of any witness apply to the witness James Anthony Allen, the defendant on trial, as well as to each and every other witness in the case.

In the course of your deliberations you are not to consider in any manner sympathy for the defendant or members of his family, or any prejudice that you may have against him either personally or as a person engaged in mining enterprises, and if you are convinced beyond all reasonable doubt by

the evidence of the guilt of the defendant Allen as to any count [1307] or counts, it is your duty to convict him of such count or counts, and you must not permit any prejudice, if any you have against the defendant Keane, to interfere. This trial is not the measure of the respective merits or any merits of the defendants Keane and Allen. It is to determine whether or not the defendant Allen is guilty. The defendant Keane has already pleaded nolo contendere, and the Judge before whom he appears will determine his responsibility.

The defendant Allen cannot of course be found guilty of the commission of one or more of the offenses charged in counts 1 to 6 inclusive or of the conspiracy count, count 7, by proof alone that he aided, abetted, or counseled the doing of the overt acts charged in paragraph 2 of each of said first six counts, or the overt acts charged in count 7, unless and until you further find from all of the evidence in the case beyond all reasonable doubt that he did such knowingly and intentionally to effect the scheme, artifice or conspiracy charged.

You are instructed that any fraudulent act done or intent entertained by the defendant Keane not disclosed to the defendant Allen would not be binding upon the defendant Allen or chargeable against him even though he may have directly or indirectly profited thereby. In order for the defendant Allen to be responsible for any unlawful act on the part of the defendant Keane, the defendant Allen at the time he shared in any such profits must have

known that Keane had the scheme [1308] or was a part of the conspiracy charged. The defendant Allen is not charged in this case with the crime of embezzlement. This court would have no jurisdiction of a charge of embezzlement alone. Such a charge as far as the Lucky Friday Extension or Pilot companies would have to be prosecuted in the state courts, probably in the state courts of Idaho. Embezzlement, if there was such, becomes important only if the mails are used in connection with a scheme or conspiracy involving diversion of funds, either in connection with the scheme or conspiracy to violate the mail fraud law or the Federal Securities Act.

You are instructed that the defendant Allen had the legal right to sell any stock in the Pilot or Extension companies owned by him upon the following conditions: First, that such sale occurred after the expiration of one year after the date of the first offering of such corporation's stock for sale through an underwriter, or second, upon brokers transactions executed upon customer's order on any exchange or in the open or counter market, but not on the solicitation of such orders, but this right of the defendant to legally sell any such stock would only extend to such stock as he was selling independent of any criminal scheme or conspiracy to violate the mail fraud law or the securities act.

Again I may advise you that what punishment the defendant may receive in the event of his conviction of any count or [1309] counts is not to be

considered by you in any respect or for any purpose in arriving at your verdict. The matter of punishment is for the Court alone. When you retire to the jury room it will be your duty as jurors to confer with each other freely and frankly about and to discuss with each other honestly the many questions involved in this case, for the purpose of agreeing, if you can honestly do so, on an unanimous verdict as to each of the seven counts in the indictment; however, your verdict as to each of the seven counts must be the honest verdict of each and all of you.

While as I have already advised you the law of this case is for the judge, and it is your duty implicitly to accept and faithfully follow as correct all of the rulings that the Court has made in this case as well as to accept as correct the instructions now being given to you, I wish to tell you this further, that what the evidence shows, what weight you are to give the testimony of the various witnesses, and particularly what inferences you should draw from the facts and circumstances proved, are exclusively your function. In respect to that you are independent, controlled neither by any opinion that the court may have or that you think the court may have, and in the event you think that I have already, or come to think that I have expressed an opinion about the guilt or innocence of the defendant Allen, or as to the credibility or weight to be accorded any testimony of any witness, this is to [1310] let you know that you're not bound or controlled at all by

what the court thinks or by what you think the court thinks as to what the verdict should be. Such is your responsibility.

When a defendant testifies in his own behalf you may consider what interest he has in the outcome of the case and whether that interest has been sufficient to lead him to deny things that really are true, or to testify to things that are not true. You will weigh his testimony the same as you weigh the testimony of every other witness in the case.

There are two kinds of evidence, direct and circumstantial. Direct evidence is evidence of that which a person observes or sees, or which is susceptible of demonstration by the senses. Circumstantial evidence is proof of such facts and circumstances concerning the conduct of the parties which conclude or lead to a certain inevitable inference or conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in every criminal case, but the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence, and inconsistent with every reasonable theory except that of guilt. When circumstantial evidence is of that character, circumstantial evidence alone without any direct testimony at all is sufficient to convict, providing the jury is convinced beyond all reasonable doubt of the guilt of the defendant merely from circumstantial evidence, or if the jury is convinced [1311] by a combination of circumstantial and direct evidence of the guilt of the defend-

ant as charged beyond all reasonable doubt, then the jury should return a verdict of guilty upon such combination of evidence, providing it is consistent with guilt, inconsistent with innocence, and inconsistent with any reasonable theory except that of guilt, or if the jury is convinced by direct testimony of the guilt of the defendant as charged, beyond all reasonable doubt, it is the duty of the jury to convict upon such direct testimony, but again it must be consistent with guilt, inconsistent with innocence, and inconsistent with any reasonable theory except that of guilt.

You may find the defendant Allen, in the event you are convinced beyond all reasonable doubt of his guilt, guilty of all seven counts of the indictment, or you may find him not guilty as to each of the seven counts, or you may find him guilty as to some and not guilty as to others, depending upon whether or not you are convinced beyond all reasonable doubt as to such respective counts.

You are instructed that it is no defense that some other person or persons should also have been prosecuted.

It is not necessary to prove that the offenses charged in any count was or were committed upon the exact day alleged in the count. It is necessary that the evidence should show beyond a reasonable doubt that it was committed on or about the times or periods charged, and in any event, within three years before the return of the indictment, that is, at any time between May 6, 1945, and May 6, 1948.

When you retire to the jury room to deliberate upon your verdict you will select one of your number as foreman. You will consider your verdict as to each count separately, and will vote separately as to the guilt or innocence of the defendant as to each count. When all of you have agreed upon your verdict unanimously as to each of the seven counts, you will cause your foreman to fill in the verdict and sign such, and then you will return into open court. You will take with you to the jury room the exhibits which have been admitted in evidence, the indictment, and the form of verdict. The indictment is not in evidence and is not proof of anything, but will go with you to the jury room so that you will be better informed of the nature of the various counts and of the dates of the various letters alleged. The verdict is in the usual form, and reads as follows: "District Court of the United States, Eastern District of Washington, Northern Division. United States of America, Plaintiff, vs. James Anthony Allen, Defendant, C-7975. We the jury in the above entitled cause find the defendant James Anthony Allen blank guilty as charged in count 1, blank guilty as charged in count 2, blank guilty as charged in count 3, blank guilty as charged in count 4, blank guilty as charged in count 5, blank guilty as charged in count 6, and blank guilty as charged in count 7 of the indictment. [1313] Blank, foreman." When you have unanimously agreed as to your verdict as to each of the seven counts, you will cause your foreman to fill in the blanks as

follows: If as to count 1 you unanimously agree that the defendant Allen is guilty, you will cause your foreman to write in the word "is" in the blank before "guilty" so that it will read "is guilty." If you unanimously agree that your verdict as to count 1 should be not guilty, you will cause your foreman to write in the word "not" in the blank before "guilty" so that it will read "not guilty" and similarly as to each of the seven counts. You must have the foreman fill in the word "is" or the word "not" in each blank before each word "guilty" as to each of the seven counts, then your foreman will sign the verdict.

You may, as I've said, find him guilty as to some counts and not guilty as to others, or guilty as to all, or not guilty as to each one of the seven.

There are many exhibits which have been introduced in this case. It's not my intention to try to hurry you in arriving at your verdict. You of course are privileged to return your verdict quickly if you conscientiously arrive at such quickly, but the jury has a right and a duty to consider all the evidence and each and all of the many exhibits to that extent as is necessary or helpful to the jury in arriving at the correct verdict in each case, each count, to the best of the jury's ability. I think this is an appropriate time for [1314] a recess. There will be one of five minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

The Court: There has been considerable mention in the argument by counsel on both sides as to what has been called Exhibit number 130, a combination of a trust agreement and a compromise agreement. You're not bound or controlled by any idea I may express as to the weight you should give that exhibit. You're privileged to give it the weight you thing it is entitled to receive. I'm privileged to tell you, however, that personally I do not feel that that exhibit in any wise sufficiently weighs against the defendant to justify your returning any verdict against him on that account. It was a compromise, and it is generally the law that people make compromises for the purpose of settling that particular matter or matters, and that they do not expect to be held responsible on account of that settlement in some other transaction, and I'm letting you know that while you're free to give that exhibit the weight you think it is entitled to receive, that personally I consider that you'd be well justified in not holding that exhibit in any wise as against the defendant Allen.

You are instructed that in the event you are convinced by the evidence in this case beyond all reasonable doubt that [1315] the defendant Allen is guilty as charged of one or more of the counts of the indictment, it will be your duty to convict the defendant Allen of such count or counts regardless of how much more active in any such violation you may find some other person or persons to have been, regardless of whom you may find to have been the

originator of any scheme or conspiracy, regardless of whom you may find to have been the dominating individual in connection with it, regardless of whether or not ultimately there was a profit or loss from any such over-all transaction, regardless of how interested you may find him to have been in any central development project, regardless of whether or not he spent any money in gambling, regardless of whether or not the original Lucky Friday Mining Company, usually referred to as the Big Friday, had more to gain or did gain more from the organization of the Lucky Friday Extension Mining Company and the Pilot Silver Lead Mines, Inc., or either of them than did the defendant or either of them, regardless of whether or not the defendants Allen and Keane had differences and parted company, regardless of how justified Allen was in having Keane removed from any authority in the management of the companies or either of them, regardless of whether or not one John Sekulic was or was not the one who originally suggested the organization of the Extension Company, and regardless of whether or not after commission of such offenses Allen put in substantial sums in the Extension or Pilot or [1316] both.

However, in determining the guilt or innocence of the defendant Allen as to each of the counts, and in determining the reasonable probabilities and the reasonable credibilities, motives, and incentives of the respective witnesses including the defendant Allen, you should give serious consideration to each

and all of the foregoing as well as to all of the rest of the evidence, including the exhibits, and to all of the facts and the circumstances disclosed by the evidence, whether I've referred to such or not.

You are instructed that if a person knowingly, intentionally and willfully violates the law, he is responsible for such violation regardless of whether or not he is to get any profit therefrom and regardless of whether or not if he expected a profit the share he expects of any benefits or profits that may be realized is large or small, regardless of whether or not he actually obtains the share he expects or is completely disappointed, and regardless of whether or not his share is or is intended to be greater than, equal to, or very much smaller than that of some other person with whom he is associated, or greater than, equal to or less than that part of some innocent party or company who participates in some part of the activity.

While I have told you that if you find any witness on any side of this case, including the defendant, has willfully, [1317] that is, intentionally and knowingly, sworn falsely as to any material fact on the trial, that you are at liberty to disregard the entire testimony of such witness except as such has been corroborated, as I've told you, by other testimony or circumstances which you accept as true, this is to let you know that you do not have to disregard the entire testimony of a witness if you find that that witness has intentionally, willfully sworn falsely to some material fact. If you find that a witness has

willfully and intentionally sworn falsely as to some material matter or fact, and you further find that he has testified truthfully as to some other matter or matters, and you determine that you can separate the false from the true, while you are at liberty to disregard the entire testimony of such witness except as it has been corroborated, as I've already stated to you, you are not required to disregard that portion of his testimony which you find to be true, but if you find that any witness on any side of the case, including the defendant, has willfully sworn falsely as I've previously stated, as to any material matter, you're not required to undertake the difficult task of separating the chaff from the wheat, or the false from the true, and are at liberty to disregard all of the testimony which is not corroborated, that is, supported, as I've stated.

If you should find that any witness or witnesses have intentionally testified falsely as to any material matter in [1318] the trial, and if you have because of that decided to disregard the entire testimony of such witness or witnesses except as such has been corroborated, as I've stated to you, then you should determine whether or not the remaining evidence establishes the guilt of the defendant Allen beyond all reasonable doubt as to the seven counts or any of them. In the event it does so establish his guilt beyond all reasonable doubt as to the seven counts or some of them, then it will be your duty to return a verdict of guilty in accordance therewith regardless of the fact that you may have disregarded the

testimony of one or more witnesses for what you find to have been willfully false testimony. I'm not suggesting by this that I do or do not believe that the defendant Keane or the defendant Grismer or the defendant Allen or any other witness has willfully, knowingly or intentionally testified falsely as to any material matter. The determination of whether any witness or witnesses, including the defendant Allen, testified truthfully or otherwise is your responsibility.

In this case if you are convinced by such evidence as you consider worthy of belief, including the facts and circumstances which you find from the evidence existed, that the defendant Allen is guilty beyond all reasonable doubt as charged in one or more of the counts, it will be your duty to so find, regardless of how much or how little credence you may give to the testimony of the defendants Keane and Grismer or [1319] either of them.

In such connection, had the defendants Keane and Grismer or either of them come to trial before you in this case upon pleas of not guilty as to each and every count, along with the defendant Allen, and had either or both of the defendants Keane and Grismer declined, as they would have had the right to decline, to take the stand, so that there would have been no evidence from them or either of them, it would still have been your duty to have found each of the defendants including the defendant Allen guilty providing you were so convinced beyond all reasonable doubt from the evidence before

you without the testimony of Keane or Grismer or without the testimony of such one as did not testify. That is, you are instructed that the testimony of neither Keane or Grismer is necessary to the government's case against the defendant Allen providing you are convinced beyond all reasonable doubt of the guilt of the defendant Allen from the other testimony, including the exhibits, facts and circumstances proved in the case to your satisfaction beyond all reasonable doubt. However, if you should disregard the testimony of any witness or witnesses, whether or not it be that of Keane and Grismer or either of them, and are not convinced beyond all reasonable doubt by the remaining testimony of the guilt of the defendant Allen as to any count or counts, then you should acquit the defendant Allen as to such count or counts concerning which you find a [1320] lack of testimony.

If you find beyond all reasonable doubt that the defendant Allen under all the evidence which you consider as worthy of belief is guilty of one or more of the counts charged in the indictment, you should return a verdict to such effect, regardless of whether or not you find that the defendant Keane deceived and cheated the defendant Allen or attempted to do so, and regardless of whether or not Keane was as incapacitated from liquor as he testified. This prosecution is on behalf of the people of the United States, and if the evidence establishes the proof of the guilt of any person beyond all reasonable doubt, the fact, if it be a fact, that some

associate in the violation was disloyal to the defendant on trial, or was otherwise guilty of misconduct, will not relieve such defendant on trial from his responsibility to the government and to the public for the violation.

In connection with each of the first three counts of the indictment, in order to sustain a conviction it must be established by the evidence beyond all reasonable doubt in addition to the other requirements for conviction, that the defendant Allen knowingly, willfully and intentionally participated to some substantial degree in the scheme or artifice therein alleged, before the mailing of the particular letter charged in such mail fraud count. As to the next three counts in which fraud is charged in the sale of a security, in addition [1321] to the other requirements for conviction it is essential for conviction of the defendant Allen as to each of said Security Fraud counts that the evidence is established beyond all reasonable doubt that the defendant Allen knowingly, willfully and intentionally participated to some substantial degree in the scheme or artifice described in mail fraud count 1 and referred to in and made a part of each Security fraud count, before the mailing of the particular letter charged in such Security fraud count.

As to count 7, the conspiracy count, it is not necessary for conviction that the evidence establish that the defendant Allen joined such conspiracy at any particular time, providing the evidence establishes beyond all reasonable doubt that the defend-

ant Allen knowingly, willfully and intentionally joined and participated in any such conspiracy before May 6, 1948, when the indictment was returned, and also before the commission in Spokane, Washington, of any one or more of the overt acts consisting of mailing or delivery of mail in Spokane, Washington, charged in count 7 and relating to that company or these companies concerning which you find the defendant Allen beyond all reasonable doubt conspired. In this connection it will be your duty to find the defendant Allen guilty of such conspiracy count if you find from the evidence beyond a reasonable doubt that he so knowingly, willfully and intentionally joined and participated to some substantial degree in the conspiracy as [1322] charged either in connection with the Extension Company or the Pilot Company before the commission in Spokane, Washington, of at least one of the overt mailing acts charged and relating to that company concerning which you may find he conspired, even though he might not have had any connection with the other company, and even though some other person or persons may have participated from the beginning in such conspiracy and to a much greater extent.

You are advised that if a person by the doing of one act violates more than one Federal law he may be prosecuted by separate counts for the different violations of different laws arising out of the same action. In a conspiracy charge there must be at least two involved; while the conspiracy count

charges three, it's not necessary that the evidence establish that more than two were involved, but Mr. Allen cannot be convicted of conspiracy unless you find beyond all reasonable doubt that he conspired either with Keane or with Grismer.

You are instructed that you're justified in finding that the letters of notification and the prospectuses of the Pilot and Extension companies constituted representations. You have a right in considering the evidence to determine whether or not the defendant Allen's manner of keeping his records and receiving and paying money was in accord with his natural way of conducting his business, or whether it was willfully done for the purpose of hiding and concealing his true connections [1323] with the Pilot and the Extension or either of them, or whether it was for the purpose of carrying on his business in the usual way, or was for the purpose of confusing or harassing investigators.

In connection with this case, if you should find beyond all reasonable doubt that the defendant Allen knowingly, willfully and intentionally diverted money on or about August 7, 1945, and on or about August 28, 1945, which belonged to the Extension Company, or on either of such dates or on or about either of such dates, that that would be sufficient to connect him with diversion of funds as charged, even though you should not be convinced beyond all reasonable doubt as to other diversions, and in the event you should find beyond all reasonable doubt that he did knowingly, willfully and intentionally

divert money on or about either of the two dates of August 7 or August 28, 1945, and further find as charged in the indictment that such was done knowingly, willfully and intentionally as a participant, even for that temporary period, in the scheme charged and the conspiracy charged, such would justify conviction of the defendant Allen as to such of counts 1, 4 and 7 as you might find under the evidence the defendant Allen was guilty of beyond all reasonable doubt, providing the respective mailings charged were mailed after any such diversion, in the event you should so find.

As to count 1 of the indictment, in the event you find [1324] beyond all reasonable doubt that the defendant James Anthony Allen as charged devised, joined or participated in, willfully, knowingly and intentionally, any scheme or artifice to defraud purchasers and prospective purchasers of stock of the Lucky Friday Extension Mining Company, and that it was a part of such scheme, known to and participated in by such defendant Allen, that concealment would be made to the public and investors and prospective investors that Allen was a promoter of the Extension, and it also is established beyond a reasonable doubt that he was such a promoter before and during the organization of such companies, or if you're satisfied beyond all reasonable doubt in connection with count 1 that the defendant Allen knowingly, willfully and intentionally participated in the scheme knowing and intending that the Extension was to sell stock to investors upon the representation that the proceeds thereof would

be used by the corporation for the exploration and development of the mining property of the Extension, and that in fact, such, to the defendant's knowledge, was not so used, or that the defendant Allen knowingly, willfully and intentionally devised or joined in or participated in such scheme with the intention that a portion of the money due the corporation from its treasury stock would be appropriated and diverted from the Extension, or if the defendant Allen knowingly, willfully and intentionally joined in such scheme as to the Extension, intending and agreeing that [1325] certain stock would be given to any attorney under the pretense that it was for attorney's fees, but that actually a part of it would come back to him as a promoter, for the purpose of defrauding the public, and if you further find beyond all reasonable doubt that after joining any such scheme and in connection therewith, and pursuant to the intention, the letter charged in paragraph two of count 1 was delivered at Spokane, Washington, as charged, then it would be your duty to find the defendant Allen guilty in any of said events of count 1, otherwise not guilty as to count 1.

I'm making it clear to you that he can only be convicted as to count 1 in the event he knowingly, willfully and intentionally participated in the scheme in the method I have just stated with respect to the Extension Mining Company. That is because, although it's charged that he entered into a scheme both as to the Extension and the Pilot, the critical letter was mailed before the Pilot under the evidence

was organized or contemplated, so count 1 will only justify a conviction against the defendant Allen in the event he knowingly, willfully and intentionally devised, joined or participated to a reasonably substantial degree in the scheme in one of the ways I have stated.

As to counts 2 and 3, the defendant Allen can only be convicted in the event he knowingly, willfully and intentionally devised or helped devise, joined in or participated to a [1326] reasonably substantial degree in the same way or ways as to the Pilot Company as I have previously specified was necessary for the Extension, and then only if such devising, joining or participating was before the mailing and delivery of the letter mentioned in paragraph 2 of count 2, which was on June 13, 1946.

Similarly, as to count 3, the defendant can only be convicted as to count 3 provided he knowingly, willfully and intentionally devised or helped devise or joined in or participated to the same degree in a scheme involving the Pilot, and before May 25, 1946, the date mentioned in count 3.

As to counts 4, 5 and 6, he can only be convicted as to count 4 in the event he joined, devised, helped devise or participated similarly in a scheme involving the Extension—just a moment, was that count 4?

The Reporter: Yes, your Honor.

The Court: ——in the Extension before the mailing and receipt of the communication alleged to have been sent or received on or about August 8, 1945, in the second paragraph of said count 4.

As to counts 5 and 6, the defendant Allen can only be convicted in the event you find such devising, joining or participating in a scheme involving the Pilot and before the respective letters therein involved.

As to each and every of said six counts, not only must you find such beyond all reasonable doubt, but you must find [1327] beyond all reasonable doubt that the letter was mailed or caused to be mailed or in the natural course of events should have been known by Allen that it would be mailed, and that it had for its purpose the furthering of the scheme as to the Extension in counts 1 and 4, and as to the Pilot in counts 2 and 3, 5 and 6.

As to count 7, you can only find the defendant Allen guilty in the event you find that he knowingly, willfully and intentionally devised or helped devise, joined or participated to a reasonably substantial degree in the conspiracy therein alleged, and that such conspiracy was for the purpose of doing at least one of the several things which I defined to you as necessary in order to justify conviction on count 1. and in addition, the evidence must establish beyond all reasonable doubt that the defendant either helped organize, joined in, or participated in such conspiracy knowingly, willfully and intentionally before the doing of at least one overt act in Spokane, Washington. The reason that such must have been done in Spokane, Washington, is to give this Federal Court in the State of Washington jurisdiction.

You shall consider all of the overt acts for such light as they may throw upon the guilt or innocence of the defendant. In addition, as to the conspiracy count, it is necessary that the particular overt act shall have consisted of the mailing or receiving through the mails of a letter or certificate [1328] related to the particular company concerning which the defendant Allen was involved in the conspiracy. If you find that the defendant Allen was involved in the conspiracy from the beginning, and as to both companies, then the commission of an overt act as to either company will suffice, but if you find that he was not involved in the Extension scheme or conspiracy, but do find beyond all reasonable doubt that he was involved in, as I've stated was necessary, a conspiracy involving the Pilot, it will be necessary for you to find that he joined or knowingly participated or knowingly joined, of course, such conspiracy before the mailing or the receiving in the mails at Spokane, Washington, of one of the letters relating to that particular company and described in the overt acts in the indictment.

You will have the indictment with you for your assistance and better understanding of the charges. It will be your duty to consider all this evidence carefully, impartially, dispassionately, for the purpose of arriving at the truth, and in doing such you will draw upon your experience, your judgment, your common sense, your understanding of the probabilities. You will remember at all times that you're officers of the court, under oath, charged

with the duty of returning the correct verdict as to each count, and because there are so many exhibits you cannot properly discharge your duty as jurors until you have sufficiently examined and understood the [1329] various exhibits as to permit you intelligently and honestly to return the proper verdict as to each count.

You should view this testimony and all of the facts and circumstances in the same light as if you had been dispatched for the honest purpose of investigating this case and determining as an investigator whether or not the defendant Allen was beyond all reasonable doubt guilty, and if you had been such an investigator conscientiously performing your duties as an investigator, and if you had had presented to you all of the facts and circumstances and exhibits as have been introduced in this case, what would your decision have been as to whether or not you were then satisfied as honest, conscientious investigators as to whether the defendant Allen was shown beyond all reasonable doubt to be guilty.

If you would then have decided conscientiously and honestly that he was guilty of one or more of the charges, it would be your duty to have the same view here. If under such circumstances you would have an honest, conscientious, reasonable doubt, it's your duty to have the same honest, conscientious, reasonable doubt here. In one event you should return a verdict of guilty, and in the other event of course a verdict of not guilty. You will now

retire, not to consider this case. You will retire until called.

(Whereupon, the following proceedings were had without the presence of the jury and one alternate juror.) [1330]

The Court: Is there any instruction that counsel on either side have counted on my giving and which I did not give?

Mr. Emigh: There was some discussion about an instruction, the court had some discussion with us on an instruction on attorney fee stock.

The Court: All right, any other?

Mr. Emigh: We have a number of objections and exceptions.

The Court: I understand that. I'm trying to find out if there's any I left out that you counted on my giving.

Mr. Emigh: I doubt that the court gave in substance some of the instructions we tendered.

The Court: Some of the instructions what?

Mr. Emigh: That the defendant tendered.

The Court: Well, I'm not asking that. I'm asking whether or not I failed to give any that you felt I indicated I would give, other than the attorneys' stock.

Mr. Emigh: Outside of that I believe not.

The Court: Any on the part of the government?

Mr. Erickson: I think they're adequate from our standpoint; you gave what we expected.

The Court: Does the government feel that the instructions given are in accordance with the law, or

does the government feel that the court has commited error which would require a new trial in the event of conviction?

Mr. Stocking: I'm just a little concerned, I was having [1331] a conference with Mr. Erickson, about the state of count 7, inasmuch as you haven't either eliminated that reference to the conspiracy to violate the registration provisions, or given an instruction.

The Court: I've stated that they had to find one or other of the matters which I specified was requisite for count 1.

Mr. Stocking: I see, so that it's coupled with the other counts, and they won't consider the registration count.

The Court: Exceptions.

Mr. Emigh: The defendant, may it please the Court, objects and excepts to the refusal of the court to give instruction numbered 3 tendered and requested by the defendant, in form or substance.

The Court: All right, you may proceed.

Mr. Emigh: The defendant objects and excepts to the refusal of the Court to give instruction number 6 in substance or form as tendered by the defendant.

The Court: All right.

Mr. Emigh: The defendant objects and excepts to the refusal of the court to give instruction number 7 in substance or form as tendered by the defendant. The defendant objects and excepts to the refusal of the court to give instruction number 8 in substance or form as tendered by the defendant. The defendant

objects and excepts to the refusal of the court [1332] to give instruction number 11 in substance or form as tendered by the defendant.

The Court: You may proceed.

Mr. Emigh: The defendant excepts and objects to the refusal of the court to give—well, I'm not positive about 12, your honor. The court gave an instruction similar to that.

The Court: I may tell you that I gave a substantial part of 13.

Mr. Emigh: I rather thought I caught it, but it was hard to keep track of them. The defendant excepts and objects to the refusal of the court to give instruction number 14 in substance or form as tendered by the defendant.

The Court: I think I gave it word for word.

Mr. Emigh: I'll withdraw that; I mismarked it. I think you did too.

The Court: All right.

Mr. Emigh: The defendant excepts and objects to the charge and instructions of the court in the following particulars, namely: That in giving of said charge and instructions the court used the term "investigate" in discussing the duty of the jurors to examine the exhibits, after referring to the exhibits, and without in any wise indicating to the jurors that this investigation should be taken and considered in conjunction with all other evidence in the case, including the oral testimony, and the use of the term [1333] "investigator" under the circumstances is misleading and prejudicial to the defendant and

eliminates their consideration of their duty in relation to these exhibits to examine them as jurors and not to investigate for the purpose of trying to find a reason to convict, as distinguished from an impartial investigation of all the facts.

That instruction as to count number 1 as given tended to permit the jury to consider misrepresentations not contained in the charge.

That the instruction as to credibility of accomplice is erroneous and misleading in this, to-wit, that the instruction included reference to the defendant Allen and the measuring of his testimony in the same respect as other witnesses, and required express evidence of corroboration as to his evidence to render the same acceptable to the jury, whereas as a matter of law that evidence is corroborated throughout and in relation to all facts by the presumption of innocence, which has the force and effect of evidence and makes the evidence of a defendant different from that of another person which has to be corroborated, whether it's evidence that's been impeached by contradictory statements or by any other means known to law, because that evidence, that of the defendant, is supported and corroborated sufficiently to make it acceptable, but not binding to the jury, without further corroboration.

That the court unduly accented, and without need therefor, [1334] to the prejudice of the defendant, the right of a defendant to complain about the instructions being lengthy, inasmuch as no complaint had been made by the defendant of the instructions being lengthy. This was a remark by the court; I doubt

that the court had in mind to indicate that we had been complaining about the instructions, but the jury was absent at the time just preceding the court's remark, and we feel that might have led the jury to believe that we were criticizing the length of the instructions.

The instructions are further objected and excepted to on the ground that in the form in which the instructions were given they tend to permit the jury to convict for aiding and abetting without participating in a conspiracy.

The instructions are further objected and excepted to as to the force and effect to be given in event the jury believed the defendant Allen had testified falsely in some part of his testimony, and requiring that such testimony be corroborated by—no—requiring that evidence not found to be false must be corroborated by other evidence, whereas the same is presumed to be corroborated by the presumption of innocence.

That the instructions permit the jury to find the defendant guilty of a conspiracy without the testimony of Keane or Grismer, whereas and under the state of the record there is no sufficient direct evidence without the use of the testimony of Keane or Grismer to establish the elements of the conspiracy [1335] charged, and that to find the elements of that conspiracy by circumstantial evidence, the jury should have been advised that such circumstantial evidence to establish that element must be consistent with but one hypothesis or one theory,

namely, guilt beyond a reasonable doubt, and cannot be consistent with innocence.

That the instructions in relation to the jury finding that Allen's way of keeping books was designed to conceal the state of the record is not based upon any evidence, and presupposes Allen's participation in some wrongful act without first advising the jury that in order to find the defendant Allen guilty of the failure to keep proper records of the corporation, it must be first established that he conspired with Keane or Grismer, particularly Keane in this particularity, because Keane was keeping the books, and not Allen, in the keeping of improper books. I believe that's the points that I took notes on, your honor.

The Court: All right; the jury may come in.

Mr. Emigh: And your honor, we wish to have an objection in the record as to the form of verdict—

The Court: You may.

Mr. Emigh: —as being confusing, misleading, and likely to result in an unforseen prejudicial verdict against the defendant.

The Court: All right, the jury may come in. [1336]

(Whereupon, the following proceedings were had within the presence of the jury and one alternate juror.)

The Court: Members of the jury, the Clerk of the Court for your convenience and with the consent of counsel on both sides has prepared a list of the exhibits by number which have been admitted,

with a brief reference thereto, and they will be contained in various envelopes with the exhibit numbers indicated on the envelopes, so by referring to the list you may be able to look for, get and examine the respective exhibits. One exhibit, a picture, won't go in an envelope, so it will be outside.

I think I made it clear, but I wish to make it clear that all the evidence and all the circumstances which you find against the defendant as to any count and each and every part thereof must be established by the evidence to your satisfaction beyond all reasonable doubt, and while there are some more allegations in the charges than I mentioned as requisite for conviction, this is to let you know that the proof to your satisfaction of any portions of the charges other than one or more of the essentials which I specified with respect to count 1 and then by reference to the other counts, will not justify conviction, but if you find beyond all reasonable doubt one or more of the essentials that I specified to you, coupled with knowing, willful and intentional devising, joining or participation [1337] in the scheme or conspiracy, and also find the mailing as I've stated, such will substantiate conviction.

You of course will not consider any misrepresentation against the defendant Allen except such as was charged in count 1 of the indictment and by reference made a part of the other counts.

With respect to the instructions given, the court is satisfied that the defendant Allen and his attorneys in no wise objected to the length of the instructions or the complexity of such, and if any inference

was given by the court in that respect, the jury will certainly disregard such.

I might say the number of the counts and the nature of the charge required me to give a much longer charge or instructions than I wish I could have felt satisfied to have given.

I as an example said that you had a right to consider what your view would be if as honest, conscientious investigators you had investigated this matter with the honest, conscientious desire of arriving at the truth. In such connection I thought I made it plain to you, if I did not I would wish it understood that if you should so conduct an investigation it would be understood that you'd have all of the evidence presented to you, both exhibit and oral, as was presented here, and that you'd see the same manner of presentation by the individuals who appeared before you as the individuals [1338] displayed to you on the witness stand.

In the indictment it is charged that among other things, the defendants in order to conceal the true amount of stock issued to them would and did cause large blocks of stock to be issued to Elmer E. Johnston of Spokane, Washington, and James E. Gyde of Wallace, Idaho, under the pretense that such stock was in payment of attorneys' fees, with the secret arrangement that a portion of such stock or the proceeds from its sale would be turned back to the defendants. This is to let you know that if you find beyond all reasonable doubt that the defendant Allen knowingly, intentionally and willfully before the

organization of either of such companies entered into any such agreement with such attorneys or either of them with the understanding that he was to get back part of such stock because he was a promoter, and so as to conceal such, that that would justify you in finding that he was a promoter, but you are instructed that if the evidence convinces you that Allen received any such stock and sold same to his profit, that that would not alone justify you in finding any guilt on the part of the defendant Allen unless you further find beyond all reasonable doubt that such was done knowingly, willfully and intentionally by him in pursuance of a scheme or conspiracy to defraud and use the mails as a secret promoter as charged in the indictment, but if you find that Allen got some of that stock and sold it, that alone does not constitute any [1340] basis for conviction of the defendant Allen. The bailiffs may come forward and be sworn.

(Whereupon, Irene Keenan and R. R. Isaacs were sworn as bailiffs.)

The Court: You will take with you the exhibits, the form of verdict, the indictment, not as evidence, but merely as an aid to your memory, your recollection of the instructions, and your consciousness of the fact that you are jurors under oath and you will talk with each other just as much as may be helpful or necessary about every element of this case, about every witness, and every exhibit, and you'll give due regard to each other's opinion with the aim of arriv-

ing at a unanimous verdict as to each count, if you can honestly do so. There's no reason at all that you should endeavor to try to hurry your decision until you can actually unanimously and honestly agree as to each count. If that means you can't do that until tomorrow afternoon, that's all right. If you can't do it until Sunday, it's your duty not to return your verdict until Sunday or such further time as is requisite for you performing your duties as jurors.

You may retire to consider your verdict. Just a moment; the alternate juror is especially thanked by the court for his services. He's now discharged. You've been a reserve soldier; you might have been essential. I'll tell you one thing; you're not obliged to tell anybody what your [1340] verdict might have been. If anybody asks you what your verdict would have been, you can say you don't care to comment, and as a matter of fact, you don't know what your verdict would have been; you might have an idea one way, but if you were to retire to the jury room and examine these exhibits and get the views of these eleven other jurors you might find the verdict you would return was just exactly the opposite from what you would have returned alone, so you have no obligation to tell anyone. Thank you, and you're excused.

(Whereupon, the alternate juror was excused from further service in this cause.)

The Court: The jury will retire. If dinner is ready now I think they should go right away. That's

subject, however, to the jury's decision. I'd like counsel to remain.

(Whereupon, the jury retired to deliberate upon its verdict.)

The Court: Are there any exceptions by the defendant to the further instructions that I gave?

Mr. Emigh: Not to the further instructions.

(Whereupon, at 6:45 o'clock P. M. the court took a recess in this cause subject to call.)

Saturday, June 18, 1949, 11 o'clock A. M.

(Whereupon, the court convened in the absence of the jury, Mr. Erickson, Mr. Stocking, Mr. Emigh, and the defendant being present.)

The Court: I'd like to speak off the record for a few moments or longer than a few moments if the parties are agreeable. Is that satisfactory, Mr. Emigh?

Mr. Emigh: Sir?

The Court: I'd like to speak off the record for a few minutes if I may; is that satisfactory?

Mr. Emigh: Yes.

The Court: Mr. Stocking?

Mr. Stocking: Yes.

(Discussion off the record.)

The Court: All right, we'll put this on the record. I have advised you gentlemen that after giving consideration and thought over the night and this

morning to the objections made by defense counsel in argument to the jury of the general nature of the indictment and the various counts thereof and to the numerous charges therein contained, that probably it would be proper for the court today by instructions which I have prepared and read to you, to advise the jury in each instance that it was essential for conviction as to any count that the [1342] scheme in counts 1 to 6 in each instance should have contemplated the intention by the defendant Allen that funds of the appropriate company covered by the count letter should be diverted, and that if such was not a purpose of the scheme, that the defendant should be acquitted. I have further thought that as to count 7, the conspiracy count, the jury should be told similarly that such diversion was a necessary purpose of the conspiracy, and that if not established beyond all reasonable doubt, that the defendant should be acquitted of the conspiracy count, the instructions in each instance to set forth that the letter mailed and delivered in Spokane, Washington, was to be to the knowledge of the defendant Allen either directly established or by inference intended for the purpose of carrying out the purposes or aiding in carrying out the purposes of any such scheme or conspiracy.

It is my understanding from informal discussion with counsel that the defendant and his counsel object at this time to my narrowing the issues as to each count, and it is my understanding that since the defense counsel objects, the government counsel

prefers that such instructions as I would prefer to give and which I have informally read to counsel be not given. Is that right, Mr. Stocking?

Mr. Stocking: That's what Mr. Erickson and I expressed, yes.

The Court: Now, Mr. Emigh, for the record I think you [1343] might express your objections.

Mr. Emigh: May it please the court, as to the instructions the court has now read to counsel and advised counsel that the court thought it might be advisable that the same be given to the jury, we make this statement in behalf of the defendant: We believe and the defendant believes that the giving of instructions after the jury has taken a case under deliberation, and unless the jury has indicated confusion in respect to the law, and the need of further instructions from the court, tends to distract the minds of the jurors from their duty as deliberators, and tends to accent the particular matter to which the instructions relate. The present instructions are known as "plaintiff's instructions." They're the instructions usually tendered by plaintiff in a criminal case. They were prepared by the court in this instance, but relate to the same matter. We feel as we did yesterday that there was some defect in the instructions given by the court. We feel these instructions are in some respects in conflict with the instructions given by the court. We feel that a jury of laymen cannot possibly, if these instructions are given, differentiate between those portions of the law to which these instructions apply and modify as

the instructions were given, and those portions of the law which the instructions would not operate to; that the proposed instructions can do nothing but at this point confuse the jury, will not be of aid to the [1344] jury, will minimize the force and effect of instructions requested by defendant and given by the court or given by the court of his own motion, securing to the defendant the right of proper consideration of his case by the court and of a fair trial, and we most respectfully protest to the court the giving of any further instructions unless and until the jury indicates that they are in confusion on some specific matter, and then at that time the matter might have a different aspect, and I want the record to be very clear in one thing: The defendant is sincere in this, and counsel appreciates that yesterday we took exceptions to instructions because we weren't clear in that regard, and we want the court to feel that we're not playing fast and loose with the court and trying to get some kind of an error in the record, because that isn't it, and that's why I'm making an extensive statement; I want the court to see how we feel about the effect of such instructions on the defendant's case.

In other words, as I have stated off the record, we do not believe that minds of the laymen, and I think that also applies to the mind of a lawyer, can grasp a copious set of instructions as has been given by the court as necessary in these cases under the law, and the giving of specific instructions at a later time we believe would cause the jury to overlook the force

and effect of previous instructions given, and we certainly want the record to show that the [1345] defendant feels that his defense will be materially prejudiced if these instructions are given, and for those reasons.

The Court: Well, counsel, do I understand that the defense is—I understand that the defense is still insisting upon each and every exception taken to the refusals by the court of the instructions requested by the defendant?

Mr. Emigh: Yes, we're waiving no exceptions, your honor.

The Court: You're waiving none as to those given by the court either?

Mr. Emigh: Not unless we have expressly waived it in the past; I think we withdrew some when we started, but we may say for the record that any legal exceptions and objections we now have, we're not waiving.

The Court: You're not only insisting on the exceptions you took, but you're insisting that the court not give any instruction that may be a correcting instruction?

Mr. Emigh: Under these circumstances, yes, your honor; I want to be very frank with the court.

The Court: Mr. Reporter, will you read the exceptions taken by counsel to the instructions given? Not those to the refusal of the requested instructions.

(Whereupon, the reporter read the exceptions taken to the instructions as given.)

The Court: Well, I had felt that the instructions I had in mind as to each of the seven counts was to the [1348] interest of the defendant, particularly in view of the defense counsel's argument to the jury. Under the circumstances, since the defendant objects to the respective instructions as to count 1 to 7 which narrow the issue and which clearly and correctly state all the ingredients of the offense, and which have been read to all counsel and the defendant, I will not insist on giving such instructions to the jury at this time, or until the jury may request instructions, if it so does.

(Further discussion off the record.)

The Court: The substantial objections of the defendant to the suggested instructions of the court are that to give the instructions at this time without a request by the jury will do two things; first, confuse the jury, and second, accentuate in the jury's minds these instructions given without the instructions given yesterday, the general instructions which would remain in effect, and in support of such position of the defense the defense reminds the court that the jury took this case sometime between 6 and 7 o'clock last evening, and after dinner continued to deliberate until half past 11 or 12 o'clock last night, and that it again commenced deliberating at a quarter after 8 o'clock this morning, that it is still deliberating, and that the court's suggestion to counsel

was not made until about a quarter after 11, and that it's now approximately ten minutes to 12. It is only fair to counsel on both sides to state that the suggested narrowing [1347] instructions which I contemplated were only read to counsel, and that while counsel on either side notices from such informal reading by the court of such contemplated modifying instructions any error therein, that neither counsel would wish to say same were free from error without an opportunity to reach such. Is the statement that the court has made reasonably correct, Mr. Stocking?

Mr. Stocking: Yes.

The Court: Mr. Emigh?

Mr. Emigh: Defendant accepts it.

The Court: All right. Well, thank you, gentlemen. Court is recessed subject to call in connection with the jury. If the jury requests further instructions I will meet such situation then.

(Whereupon, at 11:55 o'clock A. M. the court took a recess in this cause subject to call.)

Saturday, June 18, 1949, 2:20 o'clock P. M.

(Whereupon, the court convened in the absence of the jury, all counsel and the defendant being present.)

The Court: The court is in session. Word has come to me that the jury has requested another verdict. I take it a duplicate of the verdict which was had.

Bailiff Keenan: Yes, another blank form.

The Court: Is there any reason why another blank form [1348] should not be sent to the jury?

Mr. Emigh: We have no objection, except if it's going to be the same form as the previous verdict, we object to that form as being misleading, but we have no suggestion otherwise.

The Court: I'm going to suggest one thing, Madam Clerk, that is in the title of the case you put the names of all the defendants, and make it "defendants." Is there any desire on the part of either side that I have the jury come in to have the form of verdict delivered to the jury in open court, or is it satisfactory for the bailiff to deliver it?

Mr. Emigh: It's satisfactory to the defendant it be delivered by the marshal or the bailiff in charge of them.

The Court: Yes, all right. I have available for the jury a verdict reading as follows: "District Court of the United States, Eastern District of Washington, Northern Division. United States of America, plaintiff, vs. James Anthony Allen, Francis Clayton Keane, and Joseph Valentine Grismer, defendants, No. C-7975. We, the jury in the above entitled cause find the defendant James Anthony Allen blank guilty as charged in count 1, blank guilty as charged in count 2, blank guilty as charged in count 3, blank guilty as charged in count 4, blank guilty as charged in count 5, blank guilty as charged in count 6, and blank guilty as charged in count 7 of the indictment. Blank, Foreman." It is the court's intention to have this form of verdict delivered to

the jury [1349] pursuant to what the court understands is the jury's request. Now the defendant may make his objections.

Mr. Emigh: The defendant objects, your honor, to the form of the verdict. It is complete in its present form, and it would tend to mislead the jury as to the verdict which they should return, and that the defendant asks that a verdict be submitted in the alternative on each count sparately; for example, that "We the jury find the defendant James Allen guilty of count 1 in the indictment." Immediately under that another paragraph "not guilty of count 1" and a like designation as to each of the counts.

The Court: Well, I have in mind the objection of counsel. I'm satisfied that this form of verdict is as fair to the defendant as the other would be, because as counsel suggested the "is guilty" would appear first. The jury has been definitely clearly instructed that they're to vote separately as to the guilt or innocence of the defendant on each count, that their verdicts may be all guilty or all not guilty or part guilt and part not guilty, and that as to each verdict that the jury unanimously votes guilty, that they're to cause the foreman to write in the word "is" in the blank; as to each verdict as to each count concerning which they unanimously agree on a verdict of not guilty, they're to cause the foreman to write in the word "not." I'm satisfied that's clear; it's in accord with many years of practice, and personally I think [1350] it's fairer to the defendant than the verdict that Mr. Emigh suggests.

Mr. Emigh: May we have an exception?

The Court: You may. All right, Madam Clerk, you may furnish this to the deputy United States marshal acting as bailiff for delivery to the jury.

Bailiff Keenan: They'll just retain the other copy too?

The Court: All right. The court will be in recess subject to call in connection with this case and in connection with this jury.

(Whereupon, at 2:30 o'clock P. M. the court took a recess in this cause subject to call.)

Saturday, June 18, 1949, 4:50 o'clock P. M.

(Whereupon, the court convened in the absence of the jury, all counsel and the defendant being present.)

The Court: I'm advised that Mrs. Keenan, the deputy marshal acting as bailiff, has a message. What is it?

Bailiff Keenan: The foreman of the jury wished to inform you that they were at a deadlock.

The Court: All right, gentlemen; you've had the same information I've had. I may say I'm not disposed to discharge the jury this soon, with as long a case and as many exhibits as this has, but I wished counsel and the defendant to have the same information that I might have. It is my expectation [1351] in a reasonable time to have the jury brought in if in the meantime they have not agreed, so you may advise the jury that the court expects them to continue deliberating. Any objection?

Mr. Etter: No objection.

(Whereupon, at 4:52 o'clock P. M. the court took a recess in this cause subject to call.)

Saturday, June 18, 1949, 5:35 o'clock P. M.

(Whereupon, the court convened in the absence of the jury, all counsel and the defendant being present.)

The Court: Madam Clerk, will you get word to the bailiff to have the jury come in?

Mr. Erickson: May it please the court, is it proper to address the court in the absence of the jury?

The Court: Surely.

Mr. Erickson: I was wondering if it would be deemed proper to ask the jury if they had agreed as to any counts?

The Court: Yes, I think that's proper.

Mr. Erickson: And receive a verdict as to those counts to which they have agreed?

Mr. Emigh: We would want to enter an objection to the latter procedure.

The Court: You would?

Mr. Emigh: Yes. [1352]

(Whereupon, the following proceedings were had within the presence of the jury.)

The Court: Members of the jury, have you agreed upon your verdicts as to all seven counts and each of them?

The Foreman: We have not, your Honor.

The Court: All right, you may be seated. It has come to me as a message from the jury about an hour ago, as I remember it, that the jury felt unable to agree. Is that the message that was sent?

The Foreman: That's correct.

The Court: First, ladies and gentlemen of the jury, if you haven't agreed yet you shouldn't be discouraged. This case took ten days before you started to deliberate. There are many exhibits. There were many witnesses and many matters presented to you, and it's not at all surprising or strange that you haven't yet agreed. I'm going to allow you to continue deliberating. I wish to remind you that there isn't any reason to believe that if I were to discharge you and then to later have another jury come and have a trial of ten days or thereabouts for them, that that jury would be any more able or competent of agreeing than you twelve. You should keep in mind that you're just as able and just as fitted to agree as the next jury would be able after another similar trial of similar length. I'm going to ask you to return, it will soon be time for dinner, but after dinner to continue conferring [1353] calmly with each other, paying respectful attention to each other's views and recollections, with the hope of agreeing unanimously if you conscientiously can do so upon each of the seven counts. As you listen to each other, if any of you after such consideration of the others' views honestly come to the opinion that your earlier view was mistaken, then you should change your view and ac-

cept the new view that you have later come to think was correct, but I'm not suggesting at all that you should surrender any conscientious opinion merely for the sake of agreeing.

It's not intended at all when the jury deliberates that any juror should depart from that juror's conscientious, honest opinion as to the guilt or innocence of the defendant as to any count or counts merely to be agreeable with some other or others, but it is hoped that as the jury continues to consider the exhibits and each other's views, that some of them will find that they have honestly been mistaken, and that the other view is honestly and conscientiously the correct one, but if you ladies and gentlemen ultimately are not able conscientiously to agree on your verdict as to the seven counts, then of course it will be, at the appropriate time as the court deems it, necessary for the court to discharge you and then have the matter presented to some other jury, and I want again to remind you that I haven't any reason to believe that that other jury can be any better at agreeing than you are, because I would want the next jury to be just as conscientious in holding to their respective views until honestly and conscientiously convinced as you are. Finally, if you're not able to agree unanimously and conscientiously as to all seven counts, but are able to agree as to some of the counts, and are convinced that you cannot agree as to the other or others, then you may notify me and I will determine then whether or not your verdict so far as you're able

unanimously to agree shall be accepted and you shall be discharged as to the rest and some later jury presented with the responsibility and problem of deciding as to the balance. However, if you're not able honestly or conscientiously to agree unanimously as to the verdict on any count, it is my instruction to you that you should not then agree on any count. I indicated to you yesterday that I wasn't going to be surprised if it took until today or even tomorrow for you to agree. I knew all the great mass of exhibits that were before you, so I may let you know that I'm not surprised, and I think you shouldn't be discouraged. I know you're tired, and at this time I'm going to let you go back, and I hope regardless of whether or not you've been disappointed on being called in here, that you're able to much enjoy your dinner, so good-bye until I see you again.

(Whereupon, at 5:48 o'clock p.m. the jury again retired to deliberate upon its verdict.)

The Court: All right, counsel.

Mr. Etter: No exceptions.

Mr. Emigh: No exceptions. We consider it a very fair statement.

(Whereupon, at 5:52 o'clock p.m. the Court again convened in the absence of the jury, all counsel and the defendant being present.)

Bailiff Keenan: The foreman said he would like some additional instructions.

The Court: All right, the jury may come back.

(Whereupon, the following proceedings were had within the presence of the jury.)

The Court: All right, members of the jury, I understand that in behalf of the jury the foreman has a request to make as to instructions. Is that right, Mr. Foreman?

The Foreman: That's right, sir.

The Court: You don't need to stand; you may sit or stand as it's most comfortable.

The Foreman: Your Honor, I'm sorry that we had to call the court back in, and offer an apology for the whole jury at this time.

The Court: You needn't do that.

The Foreman: There seems to be some question in the jury's mind as to whether count 1 would include all the other counts. That interpretation is—a portion of it, rather, the [1356] first part.

The Court: That's one question. Now, is there any other?

The Foreman: Well, I'd like to have the jury, if there's anyone that has in mind, if they're privileged to speak up at this time. That's the only one that's been suggested.

The Court: That's the only one, as to whether count 1 includes all the other counts?

Juror Schulein: Pardon me, your Honor, may I clarify, if it isn't clear, what some of us would like to know about that count 1? In count 1 is the mail fraud count, as our understanding was, in which that one count is set forth individually as a violation, but the opening charge against the defendant purports of certain violations, and then in the second and third and fourth and fifth and sixth indict-

ment it says in so many words "the grand jury repeats the charges given in count 1." Now, I may be wrong, and then also in the seventh count, for conspiracy, in different expression, from some of our interpretation, gives exactly the same charge. Now, what we can't understand is that with these tie-ups on all the counts, it seems that with the original charge in count 1, that that would carry through in all the other six counts. Now, I don't know if I've expressed myself or made it any clearer.

The Court: I think I have in mind what is troubling the jury or some of the members, but I would prefer, since there's no airplane rush, that I might allow counsel to at least give [1357] me their views before I advise you. If there was an immediate urgent rush that required me to give you the answer now even before you could go to your jury room and back, we'd have a different situation, so I'm going to suggest that you be excused now, and I'll call you back, I hope, a little later. It's all right if the jury goes to dinner, if the dinner is ready. Suppose the jury goes to dinner, and after dinner, when you will be back, at about 7:30, I'll be here. Is that all right?

Jurors 4 and 5: We'd just as soon wait.

The Court: No, you go to your dinner, and then come back. You might be delayed only a few minutes; it might be a little longer. I know enough about dinner on Saturday night, you'd better take them when the arrangements are made.

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: Now, gentlemen, is there any suggestion by counsel on either side as to what they think I ought to say to the jury in response to this somewhat general question?

Mr. Erickson: I might state this, that I believe that your Honor should instruct the jury that the scheme is set forth in count 1 in detail, and define what that scheme is again in as short, concise language as possible, and then state that the other counts incorporate that same scheme by reference, and that the various respective counts, other [1358] counts, charge that the same scheme was used as count 1, to mail letters on the other dates mentioned in the other respective counts.

The Court: Well, counsel, I'm in somewhat of unison with your views, except I'm not satisfied of my ability to state the nature of the scheme in count 1 in concise language. All right, Mr. Emigh.

Mr. Emigh: May I suggest to the Court that there's only one question the jurors asked, and that was, if the first paragraph of count 1 was incorporated in each of the other counts named, and I think the answer under that is simply that it is, and I think that's all the jury asked and I think that's all the jury should be told. They've been thoroughly instructed on the counts. Further instructions at this time would merely accent some phases of the case which couldn't be properly considered unless a large part of the instructions pre-

viously given by the Court were given in connection therewith, and it would be our belief that the jury be told that the first paragraph of count 1 is by reference repeated in each of the other counts by reference thereto, and substantially so in the conspiracy count, because it refers to the artifice and scheme contained in paragraph 1 of the first count, is incorporated by reference and made a part of each count. I think that's all they want to know, and it would seem that further instructions beyond that would more involve [1359] the case than it would benefit it. Their question has been simple, and it's the belief of the defendant that justice will be served by giving a simple answer.

The Court: All right, Mr. Stocking.

Mr. Stocking: I was going to remind the Court that in the original instructions there was a certain differentiation as to these counts; I think two of them concern mailing of certificates of the Extension Company, and four of the Pilot Company.

The Court: That's correct, and the conspiracy count can involve both or either, but the first six counts necessarily involve one company or the other.

Mr. Etter: By the scheme set out in paragraph 1.

The Court: Paragraph 1 is embrasive enough to make it a combination scheme, but as far as count 1 is concerned, the scheme only affects the Extension Company; the letter was mailed, under the evidence, before the Pilot was formed.

Mr. Stocking: That may be the thought that's bothering them.

The Court: Well, I'm not surprised.

Mr. Emigh: The view of the defendant is that the first paragraph of count 1 is incorporated in each of the counts——

The Court: No question of that, by reference.

Mr. Emigh: ——and that's what the jury asked.

The Court: But only that portion of count 1 is incorporated [1360] in count 2 as refers to the Pilot; only that portion of count 1 is referred to in count 4 as refers to the Extension; only that portion of count 1 that refers to the Pilot is referred to in count 5. The jury will be here at 7:30, and so will counsel. It is still clear that the defendant does not want the all-embracing scheme which can be performed in one of many ways, or in part or all of many ways, reduced to but one way in which it can be a basis for conviction; that is, it's not desired that the jury be instructed that an essential part of the scheme or conspiracy must have been an intention to divert the funds of either the Pilot or Extension or both, and in furtherance of such scheme or conspiracy to use the mails; and I do not expect at 7:30 to eliminate any more from the charges of the indictment which would be a basis for conviction of the defendant than I have, but I've already told the jury that proof of either one of several purposes to defraud would be sufficient for conviction. I'm sorry, gentlemen, that I can't give you a firm excuse until 8:30. You're excused firmly until 7:30. Court is recessed until 7:30.

(Whereupon, at 6:09 p.m. the Court took a recess in this cause until 7:30 o'clock p.m.)

(Whereupon, at 7:30 o'clock p.m. the Court again convened in the absence of the jury, all counsel and the defendant being present.) [1361]

(Whereupon, the following proceedings were had within the presence of the jury.)

The Court: Members of the jury, I have thought of the question which you presented to me before dinner. The question itself is short, and an apparent short answer would be that the first paragraph of count 1 of the indictment is repeated by reference in each of the other counts and also in the conspiracy count. I'm satisfied that that was not the question that troubled you, because you have the indictment with you, and you can read as well as I that in each of the subsequent counts the grand jury re-alleges as to counts 2, 3, 4, 5 and 6 all of the allegations of the first count of the indictment except those in the last paragraph of the first count, and you can likewise read as well as I can that in count 7, that paragraph 1 of the first count of the indictment is re-alleged.

I assume that there are two problems troubling you. One is whether or not the defendant is not charged seven times with the same offense, and the other is whether or not it is necessary for the government to establish in connection with each count each and every allegation of the first paragraph of the first count. I may tell you in the first instance that the defendant is not charged seven times with the same offense. Second, it is not necessary that

the government in connection with each of the subsequent counts prove every allegation in [1362] the first paragraph of the first count. As a matter of fact, I told you yesterday that even as respects the first count, the government was not required to prove, although it was privileged to prove, all of the allegations of the first count, but it was not required so to do. For instance, as far as the first count is concerned, it is not necessary, as I told you yesterday, that the government prove that more than one person was connected with the scheme in the first count, although it was proper for the government to prove that there were two or three, and likewise I told you yesterday that as to counts 2, 3, 4, 5 and 6, that it was not necessary that the government prove that more than one person was involved in the alleged scheme, although it was proper to prove that there were two or three, but I did tell you that as to count 7, the conspiracy count, it was essential that the government prove that there were at least two involved, or it could not be a conspiracy, and in substance I advised you that if a scheme involved only one person, it was just a scheme, but that if it involved more than one person, the scheme was still a scheme, but it was also a conspiracy.

I further advised you yesterday that when one or more individuals devised a scheme to defraud, and that such scheme involved the using of the mails, that each time the mail was used was a separate offense, and that there could be as many counts as there were letters or other articles of mail as [1363]

described in the law mailed, although the government was not required to charge as many counts as there were uses of the mail.

Now, as far as the first count is concerned, as I advised you yesterday, although the first count charges a scheme involving both the Extension and the Pilot Companies, as to the first count it's only necessary that the government prove beyond all reasonable doubt that the scheme involved the Extension, although it is all right if the government proved that it involved both, but as to the first count, the defendant cannot be found guilty, even if all the necessary and essential matters alleged are proved beyond all reasonable doubt, including the mailing of the letter, unless he at least was involved in the scheme with respect to the Extension and as to the first count it doesn't make any difference whether he was involved or not involved in any scheme affecting the Pilot.

As to the second count, as I told you yesterday it is essential that the government prove beyond all reasonable doubt in order to gain a conviction as to the second count, that Mr. Allen was involved in a scheme, as I instructed you yesterday, with respect to the Pilot, and as to the second count it doesn't make any difference whether the scheme involved the Extension or not.

Similarly, I told you yesterday that in order to justify [1364] a conviction as to the defendant Allen as to the third count, the scheme had to involve the Pilot Company; as I instructed you yesterday,

it doesn't make any difference whether it involved the Extension or not, as to the third count.

As to the fourth count, the Security fraud count, the letter there charged is charged as having been in connection with the Extension, so it is necessary that the fraud charged, in order to justify a conviction, it is necessary that any fraudulent scheme proved in order to justify a conviction as to the fourth count shall have involved the Extension, and it doesn't make any difference whether the Pilot was connected with such scheme or not; but as to the fifth and sixth counts, as I told you yesterday, the scheme in order to justify conviction of Mr. Allen as to either the fifth or sixth counts necessarily had to involve the Pilot, without it making any difference whether the government proved it did or did not involve both companies; so as to the first and fourth counts, in order to justify a conviction, in addition to the other things that I told you yesterday had to be proved beyond all reasonable doubt, it's necessary that the evidence establish that the scheme was in connection with the Extension Company, regardless of whether or not the Pilot was or was not involved. In order to justify conviction as to the second, third, fifth and sixth counts, or any of them, the evidence must establish beyond all reasonable doubt, in addition to the other matters [1365] I advised you yesterday, that it was the Pilot Company that was involved in the scheme, so that if you should be convinced beyond all reasonable doubt that the defendant was involved in the

scheme to defraud as charged, and that he used the mails or that the mails were used as charged, but you found that the defendant Allen's connection was only established beyond all reasonable doubt with any fraud involving the Extension, you could then only convict him of counts 1 and 4 of the first six counts, and you'd have to acquit him of counts 2, 3, 5 and 6.

On the other hand, if you were to find beyond all reasonable doubt that the defendant Allen participated in the scheme to defraud as charged, and that the mails were used as charged and that he did the things that I stated yesterday were necessary for conviction, but that he did not become connected with any such scheme until sometime during the life of the Pilot, and then only in connection with the Pilot, you would have to acquit him as to counts 1 and 4, because they relate to the Extension, and then you could only convict him as to counts 2, 3, 5 and 6; but as to count 7, the conspiracy count, while the evidence may show, if you so find beyond all reasonable doubt, that the defendant Allen conspired with Grismer and Keane or either of them for the purposes of using the mails to defraud as charged, and/or using the mails for the purpose of defrauding as charged by the sale of securities through the mails—would you read that as to count 7?

(Whereupon, the reporter read the portion beginning with the words "But as to count 7, the conspiracy count, while the evidence may

show" and so forth, through the words "by the sale of securities through the mails.")

The Court: ——and with respect to both the Pilot and Extension Companies, it is not necessary that the evidence establish beyond all reasonable doubt that he participated in any conspiracy as to both companies as charged. It will be enough if the evidence satisfies you beyond all reasonable doubt that he participated in a conspiracy for any period as to either of the two companies or both, and as to either the mail fraud act or the Securities Act, either or both, but as I told you yesterday, in the event you find beyond all reasonable doubt that he participated in a conspiracy with some other person or persons consisting of both Keane and Grismer or either, that it would be necessary to show that after he knowingly and intentionally and willfully participated in any such scheme, that a mailing overt act was performed in Spokane, Washington, at least one overt mailing act as charged in Spokane, Washington, after he had commenced to participate knowingly in the conspiracy, and that such overt mailing charge was related to the particular company concerning which you find beyond all reasonable doubt any conspiracy he participated in was connected with, although I told you that if you [1367] found beyond all reasonable doubt that he participated in the conspiracy charged as to both companies, that then the overt act or acts could be as to either or both companies.

I further told you yesterday and made plain to

you that as to each of the counts, including the seventh count, while it was proper for the government to prove the entire scheme to defraud in the conspiracy alleged, that it was not required that the government prove all of it—what was that last?

(Whereupon, the reporter read from the words "while it was proper" through the words "government prove all of it.")

The Court: ——the government prove all of it, but only that the government was required to prove beyond all reasonable doubt that the purpose of the conspiracy, and likewise the purpose of the scheme, was for the doing of at least one of the several things of the larger number mentioned in the indictment which I yesterday told you of.

If a person individually devises a scheme to defraud by use of the mails and he sends one letter, he can be charged in one count, if that one letter is in connection with and for the purpose of furthering the fraud, whether it succeeds or not. If he sends ten letters for the same single scheme of himself alone, he can be charged in ten different counts, one count for each letter, although the government doesn't have to and probably wouldn't charge him with that many counts. If, however, an individual joins with some other person or [1368] persons in a scheme to use the mails to defraud, and one letter is sent, whether by him or by one of the others, or as a natural consequence of the performance of the intended scheme which that party should know

in all probability would occur, then that individual and the other individuals can be charged in one count with conspiracy, and then they can also be charged in addition to the conspiracy with a separate count for each letter that was mailed, so that if two or more persons form a scheme to defraud, using the mails, and send one letter, there could be two counts against them, one of conspiracy and one that they mailed a particular letter for the purpose of effecting the scheme to defraud. If two or more persons joined in the scheme together to use the mails to defraud, and ten letters were mailed, then the two or more could be charged with a conspiracy in one count, and they also could be charged in ten separate counts, one for each letter that was mailed. That would make a total of eleven, and there's not a duplication of charges, because each mailing is a separate count. The conspiracy is another separate count, and if in addition the scheme to defraud is to not only use the mails, but to use the mails to violate the Securities Act by selling shares of stock in a corporation, then there can be a charge of conspiracy, another charge of using the mails to defraud, and a third charge of using the mails to defraud through the sale of securities. [1369]

I've said this much because I have felt that your question indicated two things, one that you were wondering whether or not the defendant was not charged seven times with the same count, which he's not, and the second, whether or not the government had to prove each and all of the allegations of

each count, or of count 1, because it's referred to in the others, and again, the government does not, but the government does have to prove for conviction of the defendant Allen as to each and every count all of the things beyond all reasonable doubt which I advised you yesterday it was necessary for the government to prove.

I'll let you know now that all of the instructions that I gave you yesterday are in full force and effect, including the presumption of innocence, reasonable doubt, its definition, and all of the other things that I told you yesterday. You may now retire.

(Whereupon, at 8:04 o'clock p.m. the jury again retired to deliberate upon its verdict.)

Mr. Emigh: The defendant James Anthony Allen objects and excepts to the instructions given by the court in answer to a request of the jury for further instructions as to whether or not paragraph 1 of count 1 of the indictment was incorporated in each of the remaining counts, on the grounds and for the reasons that said instructions do not in direct, simple and understandable language to a layman answer the one simple and [1370] direct question asked by the jury; that the instructions given by the Court, while the gist of the answer is contained therein, the answer is so concealed by divers, numerous and extensive other instructions as to elements not inquired of by the jury as to wholly conceal the answer to the question propounded by the jury, and the remaining portions of the instructions, while

correct statements of the law, are not in answer to the question, to the direct question of the jury, but are in answer to a condition of mind which the court assumed the jury entertained, not directly disclosed by their question, and thereby the instructions given by the court tend to distract the minds of the jury from the answer which they sought to have elicited, and serve only to further perplex and to confuse the jury and to re-impress upon their minds the essence of the instructions commonly known and referred to as "plaintiff's instructions", and tend to single out and point out certain matters and things to be proven which the jury it must be assumed understood, or they would have, when asked if there was further confusion, stated to the court.

That further, in an instance or two in the Court's instructions and in dwelling upon the essential elements to be proven in relation to the various counts, the court omitted to state in connection with each count that one or more of the objects of the scheme, and the scheme itself set forth in paragraph 1 of the indictment, must be proven in connection [1371] with each and every overt act committed and in connection with the indictment. That's all.

The Court: The exceptions have been heard. They will be noted. The court must assume that the jury wished more from the court than a statement that the indictment in the other later counts realleged the allegations of the first paragraph of count 1, because the jury has the indictment, and it

so states. The court feels the statements made to the jury were in answer to the problems suggested by the question of the foreman particularly, by reason of the further statements of juror number 5. The Court will be at recess.

Mr. Emigh: Pardon me; did you make an express ruling on the exceptions, your Honor?

The Court: Well, I said the exceptions will be noted; the statements I gave to the jury will stand.

Mr. Emigh: Well, I wasn't clear, and I wanted to be sure to have it in the record. Thank you.

The Court: Court will be recessed subject to call in connection with this case and this jury.

(Whereupon, at 8:10 o'clock p.m. the Court took a recess in this cause, subject to call.)

(Whereupon, at 10:30 o'clock p.m. the Court again convened in the absence of the jury, all counsel and the defendant being present.)

The Court: I'm contemplating having word sent to the [1372] jury that they may decide whenever they'd like to go to bed, because it is my idea that at least the jury should be kept together for a reasonable time tomorrow. It must be remembered that there's not much more than twenty-six hours gone by since they returned from dinner last night, and my disposition is to tell the marshal that he may advise the jury that they're free to go to bed at any time they'd like. Any reason I shouldn't so advise the Marshal?

Mr. Emigh: Your Honor, at this time the de-

fendant moves the court for an order discharging and dismissing the jury on the grounds that the jury has sufficiently deliberated upon the verdict, having come before the Court, requested additional instructions, and having been given such instructions and having not reached a verdict within a reasonable time. More than twenty-six hours have elapsed since the case was given to the jury, and a verdict of either kind, guilty or not guilty, reached by the jury after this stage will be one resulting from coercion resulting from requiring a further consideration of the case.

The Court: The Court has heard the motion.

Mr. Emigh: Exception.

The Court: If this were a case of only a short trial and a few exhibits, or perhaps if it were a case of a trial as long as it was with no exhibits or few, there would be more merit in the defense motion. The exhibits in this case [1373] cannot be measured merely by the number that have been admitted. Many of those exhibits consisted of many items which could have been introduced as a separate exhibit, and no real favor will be done to anyone to discharge this jury and then to have another fetched to hear the same trial and to be perplexed by the same mass of exhibits. The motion has been heard; it is denied.

Mr. Emigh: Exception.

The Court: The bailiff may advise the jury that whenever they'd like to go to bed, they may, that

is, when they have decided that the jury as a whole would like to retire, they may do so.

Bailiff Isaacs: You don't want them brought in here?

The Court: I don't know any reason they should come in here, not at the present moment. This may mean that they'll come in here. We'll wait for a little while for any message that may come.

Bailiff Isaacs: I gave the foreman your message, your Honor, and he said they would like to continue, they will let us know when they want to retire.

(Whereupon, the Court took a recess in this cause, subject to call, and at 11:42 o'clock p.m., recessed to convene at 9:30 o'clock a.m. Sunday, June 19, 1949.) [1374]

Sunday, June 19, 1949, 9:35 o'clock a.m.

(The Court convened in the absence of the jury, the defendant and all counsel except Mr. Cullen being present.)

The Court: Court is in session. The jury has just started, and I think the jury should be kept together a reasonable time. Yesterday the defense thought a reasonable time had already expired. I'm assuming that the defense still has the position that the jury is to be discharged, is that right, Mr. Emigh?

Mr. Emigh: That's correct.

The Court: What is the government's position?

Mr. Erickson: The government believes that the jury should be kept together a reasonable time in view of the length of the case, the complicated number of exhibits, and the multitude of evidence, and before they're discharged I think they should be queried as to whether or not they've agreed upon any counts. We have authorities to support the contention that the court can so inquire.

The Court: Let me see the authority.

Mr. Erickson: Well, Mr. Stocking has some there. I have one, U. S. vs. Klanos, 163 F. 2d 593, and 65 F. 2d 285, U. S. vs. Frankel, and the case in 163 F. 2d is particularly significant in that it was decided after the new criminal rules [1375] went into effect, for whatever change the new criminal rules make in the old procedure. Mr. Stocking has a Supreme Court case.

Mr. Stocking: It's an old Supreme Court case that seemed to be one of the leading cases, Sylvester vs. U. S., 170 U. S. 262. U. S. vs. Catter, 60 F. 2d 689, is another case that holds that the verdict as to certain counts can be received before disposing of the whole case.

The Court: Court will be at recess subject to call.

(Whereupon, at 9:37 a.m. the Court took a recess in this cause, subject to call.)

(The Court convened at 10:25 o'clock a.m. in the absence of the jury, the defendant and all counsel except Mr. Erickson being present.)

The Court: The Court understands the jury has

agreed upon its verdict. You may bring in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.)

The Court: Has the jury agreed upon its verdict?

The Foreman: We have, your Honor.

The Court: As to each and all of the seven counts?

The Foreman: Yes, sir.

The Court: You may hand the verdict to the bailiff. The clerk may read the verdict.

(Whereupon the verdict of the jury was read in open court, [1376] and at the request of Mr. Emigh, the jury was polled.)

The Court: The jury have been polled, and each juror has said that the verdict as returned of not guilty as to each of the first six counts, and as to the defendant being guilty as to the seventh count, is the verdict of each juror and of the jury. The verdict of the jury is that the defendant is not guilty on the first six counts, is that correct?

The Foreman: Correct.

The Court: And it is the verdict of the jury that the defendant is guilty on count 7?

The Foreman: Correct, your Honor.

The Court: All right, the verdict will be filed. Is there any reason this jury should not be discharged from further consideration of this cause?

Mr. Emigh: No, your Honor.

(Jury discharged and excused.)

(Discussion between court and counsel regarding bail of defendant pending imposition of sentence.)

Mr. Emigh: May it please the Court, counsel has called to my attention the fact that under the new rules, we should probably, to preserve our record, renew our motion for acquittal at this time. My impression was we had five days, but to be absolutely on the safe side, may the record show that the defendant now renews the motion for judgment of acquittal submitted to the court at the close of the government's case, as to count 7 of the indictment, having been found not guilty [1377] as to the other counts; that is to preserve our record, your Honor, in case it is necessary.

The Court: A motion has been presented. The same is overruled and denied. Exception noted, and I will fix the 16th day of July, 1949, in this courtroom, at 11 o'clock a.m. as the time for hearing any motion for new trial that may be submitted, and for the time for imposition of sentence in the event no motion is presented, or if presented and such is overruled.

(Whereupon, at 11 o'clock a.m. Sunday, June 19, 1949, the Court took a recess in this cause until Saturday, July 16, 1949, for hearing of motions and imposition of sentence.) [1378]

Spokane, Washington, Saturday, July 16, 1949

(Defendant's motion in arrest of judgment, motion for judgment of acquittal as to count 7, and motion for new trial as to count 7 having been presented, argued and denied, the following proceedings were had, defendant and all counsel except Mr. Murray being present.)

The Court: The Court has heard what has been said by Mr. Emigh with respect to Mr. Allen. This matter was presented to me through two weeks of trial. Necessarily I have a much greater acquaintance with him and his life than I would have had if he had pleaded guilty before me today and was before me immediately thereafter for sentence.

Since the return of the verdict I've given serious consideration to what I should do. I may say that it has not been my practice, and I'm sure I have not done it other than in most extraordinary circumstances, to place one on probation for a felony where that one has stood trial, and in this instance I feel that a sentence should be imposed and should be served. The problem before me is what that sentence should be. It is my recollection the maximum which the law permits is imprisonment of two years with a fine, is it $5,000?

Mr. Erickson: $10,000.

The Court: A fine of $10,000. If the law provided and if Mr. Allen's means made payment practicable, I would of [1379] course feel that aside from imprisonment there should be a fine sufficient

to make restitution to all those persons who have lost by reason of the activities of the defendant and his associated. The law provides no such remedy, and if it did, Mr. Allen's finances I'm satisfied would make the imposition of such a fine merely a gesture.

I'm satisfied from what has been seen by me in the courtroom that Mr. Allen is extremely fortunate in his wife and daughters. The tragic thing today is that the innocent wife and daughters will suffer so extremely. Unfortunately, usually the innocent loved ones in practically every case are those who bear the brunt for law violation. They of course will not be able to realize it; I do, however, sympathize with them tremendously. It's been suggested that Mr. Allen has many friends who are still his friends and still have confidence in him. I have no reason to question that, and those friends will neither agree with or understand what I am compelled to do. It is a sad thing when a man with a wife and daughters and friends has to be sentenced in a court of law, but it's even sadder when a man without family or without friends loses even his liberty.

I may say that having heard the evidence, watched the witnesses, examined the exhibits, and considered the explanations, that I'm satisfied that the jury's verdict as to count 7 was correct. I've already said that it was difficult to [1380] comprehend the acquittal on the other counts except as it might have been natural leniency and a feeling of

being influenced by the prosecution's acceptance of a plea from Mr. Grismer as to one count.

As to the transaction itself, it's my belief that Mr. Keane told the truth. Necessarily, I feel that Mr. Allen intentionally did just the opposite. Its hard to say which of the two was the more to blame. True, Mr. Grismer and Mr. Keane and Mrs. Vermillion and I think Mr. Evans have expressed the opinion that Mr. Allen was the dominating figure in the plan. Quite probably they believe that. I'm not certain that Mr. Allen was any more an effective actor than was Mr. Keane. Mr. Grismer, of course, was merely a minor cog in the machine. It never was intended, so far as the evidence shows, that he was to get anything much more than a job. There was never any suggestion that the compensation to him for that job was to be unreasonably generous, and in addition, insofar as anyone received any temporary benefits, those ones were Mr. Keane and Mr. Allen.

It would be my idea that Mr. Keane and Mr. Allen both and each expected that they would make enough from the Lexington, I think it was, to repay the pilferings or diversions, whatever they may be called, from the Extension and the Pilot. I've been called on, however, many times to sentence someone for embezzlement who never intended to permanently deprive the [1381] fund of what belonged to it. Most of those who appropriate funds accessible to them do it with the idea that they will make the abstractions good. The sad fact is that

so frequently they not only do not make such good, but increase the deficit in desperate attempts to correct the original mistake.

In the trial Mr. Allen was a personable witness. I'm satisfied that the jury would have been glad to have found him not guilty on all seven counts if the evidence and their oaths had so permitted. The thing that cannot be justified on either his part or that of Mr. Keane was the total disregard of the sanctity of funds belonging to a lot of people or to other people. Whenever any funds came into any corporation in which either of them seemed to be interested in, either seemed to have that completely mistaken idea that they could take away and return and divert those funds as happened to suit their then temporary wish. There didn't seem to be any thought of consulting the people who actually were the owners of the money, and this court must be extremely careful that it does not seem to approve such a very wrong and such a very dangerous idea on the part of people who happen to be in control of a corporate treasury.

I agree with Mr. Emigh that to a large degree, Mr. Allen has already suffered. I agree with him that his family has and will suffer tremendously. I'm considerably inclined to believe that neither his general creditors or the particular [1382] stockholders in these two companies will gain the slightest material benefit from his incarceration. My responsibility is greater than that. I mustn't do anything that would encourage others to deal callously with trust funds, and at the risk of what hurt

I do to him, his family, his friends, creditors and stockholders, I must require him to serve a sentence.

It's somewhat inconsistent to me that Mr. Allen could have been sentenced to five years if he had been guilty on count 1 of the mailing of one single letter, but can only be sentenced to two years for being involved in a scheme that embraced the mailing of many letters. I'm not Congress. I don't have to harmonize those inconsistencies. Frankly, I think Mr. Allen's sentence should be greater than the maximum I can give him under the law for count 7, but of course I can't impose a greater sentence than two years and $10,000 fine. I consider the jury's verdict a recommendation for leniency. Such doesn't bind me, but I shouldn't disregard it. The fine itself would undoubtedly be paid by his family and creditors. My feeling is that there would be no greater warning by a combination of fine and imprisonment than there is by imprisonment alone.

Having said that a greater sentence than two years is what Mr. Allen should receive, it might seem that I would have a rocky road in trying to explain giving him something less [1383] than two years. There are many good things than can be said of Mr. Allen in addition to those that have been said by Mr. Emigh. It is proper to give him consideration for such. All in all, I think a sentence of eighteen months is one that the court should impose. This is not yet a ruling. Both sides know what I'm now thinking. The recommendation of the court would be that such be served on McNeil Island. Now that I've made an indication, counsel

on each side may say anything if they wish. Mr. Erickson?

Mr. Erickson: We have nothing to say, your Honor.

Mr. Emigh: We've said what we could, your Honor.

The Court: Before imposing sentence, under all the circumstances I think I can well say that my own opinion is that Mr. Allen and Mr. Keane were about equal in their activities, Mr. Keane more active in one direction, Mr. Allen perhaps in another. Mr. Keane by virtue of his office and his name and his signature having been used, it seems to me was guilty to an absolute certainty whether he pleaded nolo contendere or not. Mr. Allen, being conscious of an injunction, put himself in a position where the evidence was not to an absolute certainty, but was beyond all reasonable doubt. Mr. Grismer was substantially a dupe, as I see it. Under all the evidence he was responsible for the law violation he engaged in, but he was a rather inconsequential participant.

Mr. Allen may come forward. It is the judgment of the [1384] court that the defendant James Anthony Allen upon the verdict of the jury is guilty of the conspiracy charge contained in count 7 of the indictment. He's committed to the custody of the United States Attorney General or his authorized representative for imprisonment in such institution as the Attorney General or his authorized representative by law shall designate for a

period of eighteen months. The United States Penitentiary on McNeil Island is recommended as the place of imprisonment. He's remanded to the custody of the United States Marshal for delivery to the head of such institution as the United States Attorney General or his authorized representative may designate in execution of this sentence.

Mr. Emigh: May we have a five day stay of execution in which to prepare a notice of appeal?

The Court: Any objection?

Mr. Erickson: There's no objection, if the court desires that to be done.

The Court: Well, my inclination would be to give you a seven day extension, if you want five.

Mr. Emigh: Well, we would be pleased to have seven, but I didn't want to impose on the Court, and we would ask that he be permitted to go on bond until he surrenders himself to the Marshal on the seventh day, and at this time may the record show that we would ask that he be permitted bond on appeal. That I believe would require another bond if the Court permits [1385] it.

The Court: I think it personally entirely reasonable that he should have a stay until a week from today. There's no reason that the judgment signed today should not so provide. I think there should be a stay until 11 o'clock a.m. on Saturday, the 23rd day of July, 1949.

(Bond on appeal fixed at the sum of $15,000. Judgment and sentence signed by the Court in the presence of the defendant and his counsel.)

(Whereupon, there being nothing further to come before the Court in this cause, the Court adjourned.) [1386]

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Lloyd L. Black, a Judge of the District Court of the United States for the Eastern District of Washington, held on June 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19 and July 16, 1949, at Spokane, Washington.

That the above and foregoing contains a full, true and correct transcript of the proceedings had therein.

Dated this 7th day of October, 1949.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed December 21, 1949. [1387]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify the foregoing typewritten pages numbered from 1 to 1431 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein in the United States Court of Appeals, as called for by Appellant's Designation of Record on Appeal, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitute the record on the appeal from the Judgment of the United States District Court for the Eastern District of Washington to the United States Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that in accordance with the Order of this court entered on the 13th day of August, 1949, I herewith transmit the original exhibits received in evidence at the trial of this cause.

I further certify that the fees of the clerk of this court for preparing and certifying the foregoing record amount to the sum of $36.80, and that the same has been paid in full by R. Max Etter, of Attorneys for the Appellant.

In witness whereof, I have hereunto set my hand

and affixed the seal of said District Court at Spokane, in said District, this 17th day of December, A.D. 1949.

[Seal] /s/ A. A. LaFRAMBOISE,
Clerk of said District Court.

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO SUPPLEMENTAL TRANSCRIPT OF RECORD, PURSUANT TO APPELLANT'S SUPPLEMENTAL DESIGNATION OF RECORD ON APPEAL

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages, numbered 1 to 3, inc.* to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as called for by Appellant's Supplemental Designation of Record on Appeal, now on file and of

*[Certificate for following documents only.]

Order of the District Court filed Sept. 16, 1948—vol. I page 24 of this printed record.

Bill of Particulars filed Sept. 24, 1948—vol. I page 25 of this printed record.

Supplemental Designation of Record on Appeal filed Dec. 12, 1949—vol. I page 129 of this printed record.

record in the office of the Clerk of said District Court, and that the same constitute a part of the record on appeal from the Judgment of the United States District Court for the Eastern District of Washington to the United States Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that the fees of the clerk of this court for preparing and certifying the foregoing record amount to the sum of $1.30, and that the same has been paid in full by Therrett Towles, of counsel for Appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said District, this 17th day of December, A.D. 1949.

[Seal] /s/ A. A. LaFRAMBOISE,
Clerk of said District Court.

[Endorsed]: No. 12437. United States Court of Appeals for the Ninth Circuit. James Anthony Allen, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed December 21, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit
No. 12437

UNITED STATES OF AMERICA,
Appellee,

vs.

JAMES ANTHONY ALLEN,
Appellant,

and

FRANCIS CLAYTON KEANE, and
JOSEPH VALENTINE GRISMER,
Defendants.

ORDER

Good cause appearing therefor, now on motion of the attorneys for appellant James Anthony Allen in the above entitled action,

It Is Ordered that the original exhibits in said action need not be printed and included in the printed Transcript of the Record on appeal therein, but may be considered by the court in their original form.

Done at San Francisco, California, this twelfth day of November, 1949.

/s/ WILLIAM DENMAN,
Chief Judge, U. S. Court of Appeals for the Ninth Circuit.

/s/ WILLIAM HEALY,
/s/ H. T. BONE,
Judges U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed, December 14, 1949.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes now appellant James Anthony Allen in the above entitled cause and files the following Statement of Points on which said appellant intends to rely upon his prosecution of the appeal in the above entitled cause, and says that in the foregoing proceedings, and in said judgment, there is manifest error, in this, to wit:

Point No. 1

The court erred in denying the motion of defendant Allen to dismiss Count VII of the indictment on the ground that the indictment is bad for duplicity in that it charges in a single count a conspiracy to commit more than one offense, to wit, the offenses denounced by Sec. 338, Title 18 USCA; Sec. 77 (q) of Title 15, USCA, and Sec. 77 (e) of Title 15, USCA; on the further ground that the setting up of more than one offense in a single count does not enable the court nor the jury to deal intelligently with the charge, and seriously handicaps the defendant in making his defense and prevents him from properly, fairly, or legally defending; that the said count does not apprise this defendant of the nature of the charge against him, particularly because the charge of crime collectively included in said Count VII and being 77 (e) of Title 15, USCA, is indistinct and ambiguous for the reason that no substantive charge of the violation of said statute is

set out anywhere in the indictment and it is impossible in any fashion whatsoever to determine any connection with the various crimes alleged in said Count VII and the overt acts set out therein; and on the further ground that said Count VII of the indictment does not state facts sufficient to constitute a crime against the United States.

Point No. 2

The court erred in denying the oral motion of defendant Allen, by adoption of defendant Keane's motion, for an order directing plaintiff to file a bill of particulars setting forth as to the first paragraph of Count VII of the indictment what pretenses, representations and promises were made by defendants and who made them, and to whom they were made, and when they were made, and whether they were oral or in writing, and wherein the same were false and fraudulent, when and where the defendants devised and intended to devise the device, scheme and artifice, the names and addresses of the "investors" whom plaintiff intends to use as witnesses in the trial of this action, how much stock of Extension and Pilot was issued to Elmer E. Johnston of Spokane, Washington, and James E. Gyde, of Wallace, Idaho, and how much of said stock or proceeds from its sale was turned back to defendants, and what amounts to each of them, the amount of funds of Extension and of Pilot which had been appropriated and diverted to defendants' own use and benefit, and how much thereof to each of said defendants, when

and where each defendant became a party to said conspiracy, and the names and addresses of the persons to whom securities of Extension and of Pilot were sold and delivered by defendants and amounts thereof; as to paragraph 9 of Count VII of the indictment, the amount of stock therein described received by each defendant; as to paragraph 10 of Count VII of the indictment, the amount of stock therein described received by each defendant; as to paragraph 11 of Count VII of the indictment, when defendants directed Irene Vermillion to draw and sign checks, and which defendants directed her so to do, the number of said checks, and the amount of each, and to whom each is payable; as to paragraph 12 of Count VII of the indictment, when defendants directed Irene Vermillion to draw and sign checks and which defendants directed her so to do, the number of said checks, and the amount of each, and to whom each is payable, and as to paragraph 13 of Count VII of said indictment, the amount of Extension stock sold by defendant Allen, and when said sales were made; all on the ground that the above matters are not averred with sufficient definiteness or particularity to enable defendant Allen to be apprised of the nature of the charges made against him or properly to prepare for trial.

Point No. 3

The court erred in overruling objection of defendant to the question asked the witness Irene Vermillion as follows: "Q. And at whose direction were you acting when you received those checks and en-

dorsed them?", on the ground that the question called for a conclusion of the witness, the proper foundation had not been laid, and if the directions were not given in the presence of defendant Allen, it would constitute hearsay; that no conspiracy has been established, and the directions of another alleged co-conspirator would not be now admissible, and in permitting the witness to testify as follows: "A. Mr. Keane and Mr. Allen."

Point No. 4

The court erred in overruling objection of defendant to the testimony of the witness Irene Vermillion in identifying Plaintiff's Exhibits Nos. 1 to 6 inclusive (checks of brokers deposited in bank account of Extension Company, deposit slips and check stubs of Extension Company, and checks drawn on Extension Company account), and all similar documents and exhibits identified in the same manner or offered in evidence, on the ground that they are incompetent, irrelevant, and immaterial, no proper foundation has been laid in this respect, the exhibits do not appear to be in the handwriting of defendant, nor to have thereon endorsed the signature of defendant; that the state of the record is such that the responsibility of the defendant or the connection of the defendant with these exhibits has not been shown; that, as to the defendant in the present state of the record, all these exhibits are hearsay; that the evidence is insufficient to establish a conspiracy and to make these exhibits competent on the theory of an act of co-conspirator, and that

the exhibits leave the jury to surmise and to speculate in respect to their competency and effect.

Point No. 5

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibits Nos. 6a and 6b (checks of Extension Company, No. 8, $10,000, 8/7/45, to Delaware Mines; No. 9, $5,000, 8/28/45, to Montana Leasing Co.) on the grounds stated in Point No. 4.

Point No. 6

The court erred in overruling objection of defendant to the question asked the witness Irene Vermillion, "Q. Did he (Allen) ever have any other conversation with you about these checks, about his purpose in taking these checks?" (referring to Plaintiff's Exhibits Nos. 6a and 6b) on the ground that the question is leading and suggestive, and in permitting the witness to testify as follows: "Mr. Allen asked me for the checks and I asked him what I should put on the stub, and he told me he would give me the information later."

Point No. 7

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 18 (check of defendant J. A. Allen, trustee, to Pilot Co. of 11/20/46 for $7,000) on the ground that the exhibit is incompetent, irrelevant, and immaterial, and does not prove, or tend to prove, any of the issues of this case, and that the exhibit is as consistent with a legitimate transaction as any other.

Point No. 8

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibits Nos. 15a and 15b (checks of Pilot Co. deposited to War Eagle bank account, 6/28/46 for $200 and 7/31/46 for $1000) on the ground that said exhibits are incompetent, irrelevant, and immaterial, no proper foundation has been laid for introduction of said exhibits at this time, and that the same do not tend to prove or disprove any issue under the indictment in this case.

Point No. 9

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 46 (two checks of Callahan Consolidated, Aug. 6, 1945 for $900, and August 28, 1945 for $150) presented to court for admission on grounds of comparison, for the reason that no proper foundation has been laid for admission of such exhibit under evidence thus far adduced or under any allegation made in any count in indictment with reference to defendant Allen, exhibit is incompetent, irrelevant and immaterial to prove any allegation under any of counts laid in indictment with reference to defendant Allen, and will lead jury at present time in state of record to conjecture and speculate as to effect of exhibit and that a comparison at this time is incompetent, irrelevant and immaterial under issues made in this case and the purpose sought to be made by admission of this exhibit.

Point No. 10

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 47 (stock certificates issued to Beatrice McLean in Extension Co.) on ground that exhibit is incompetent, irrelevant and immaterial because, so far as evidence thus far adduced, no connection has been shown of defendant in particular sale, if there was a sale, of this stock with any count or allegation in indictment at this time, no foundation laid to connect exhibit itself with any unlawful act of defendant as alleged and charged under any count of indictment at present time.

Point No. 11

The court erred in overruling objection of defendant to question asked the witness Evans: "Q. Who was dominating the Lucky Friday Extension Mining Company's affairs at the time you were acting as secretary thereof?" on the ground it invades the prerogative both of the jury and the court, and calls for a conclusion of the witness as to who was dominating, and permitting the witness to testify as follows: "Well, I would say that both Mr. Keane and Mr. Allen."

Point No. 12

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibits Nos. 51 and 52 (transmittal letters of Extension stock to Gibson and Lavigne Companies) on ground that no proper foundation has been laid; they are incompe-

tent, irrelevant and immaterial as it affects any charge laid in indictment in relation to defendant Allen; no connection shown to said defendant and he is not privy to anything that appears here.

Point No. 13

The court erred in admitting in evidence, during the testimony of witness Nolting and after defendant Grismer had testified, over objection of defendant, Plaintiff's Exhibit No. 72 (Gibson's ledger sheet, account of B. A. McLean) and Plaintiff's Exhibit No. 48 (six checks E. J. Gibson and Co. to cash and B. A. McLean, 1/20/47 to 9/26/47), on ground that as to Exhibit 72 no proper foundation has been laid, not connected up in any way to prove any allegation of any count in indictment against defendant Allen, nor does it show any privity of transaction of said defendant as related to any count in indictment and it is incompetent, irrelevant and immaterial at this time, and that as to Exhibit No. 48 on the face of the exhibit each and every check so designated, beginning with January 20, 1947, and going through September 26, 1947, is incompetent, irrelevant and immaterial to prove any issue made in this case as to the joint concert alleged in counts I to VII of indictment, including those on mail fraud, security fraud and conspiracy, and on the ground that the evidence has already disclosed, and there is no contradiction, that there could not have been any joint concert of action between defendants after witness Grismer and defendant Allen had thrown out or demanded and secured the resignation of Keane who is charged

as an actual accomplice in all the general counts of indictment running up to present time, and that these exhibits on no theory can prove any count set forth in indictment beginning January 20, 1947; that there is no allegation there was any concert of action between Allen and Grismer and as to Grismer six counts alleging such concert of action have been dismissed; that the indictment as to every count alleges prior to June 1, 1945, and continuing to date of indictment naming each and every one of defendants as being co-conspirators with no allegation at all made that there was ever any conspiracy, so-called, existing between two separate defendants beginning at any particular time, but that it was a continuing conspiracy between all three, and on the further ground that there is no connection of these checks on their face or in any other way or of the testimony developed so far with defendant Allen; and on the additional ground (when Exhibit No. 48 was reoffered and admitted upon witness Keane's redirect examination) that on the face of each and every one of these separate items that appear in the exhibits are dates starting with the end of January, 1947, and extending as far as September 26, 1947, and on the testimony of the witness Keane himself that he considered there was no agreement or otherwise, assuming that there ever was, which this defendant denies, between him and Allen after the fall or early fall of 1946, and based further upon the testimony adduced with respect to said witness Keane and defendant Grismer that no conspiracy then could exist so far as

defendant Grismer was concerned and that it is within the exempted transaction, having been made over a year after the original offering, and not claimed that it is treasury stock.

Point No. 14

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 70 (Gibson ledger sheet, account Helen Allen), Plaintiff's Exhibit No. 73 (Gibson's checks to J. A. Allen or Helen Allen, 7/2/46 to 12/30/46), and Plaintiff's Exhibit No. 74 (Summary of sales of Extension stock, Helen Allen account to E. J. Gibson & Co.) on the same grounds stated in Point No. 13.

Point No. 15

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 71 (Gibson ledger sheet, account Helen Jurgenson) and Plaintiff's Exhibit No. 75 (Gibson's checks to Helen Jurgenson, 11/19/45 to 8/1/46 on the same grounds stated in Point No. 13.

Point No. 16

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 1 (checks from E. J. Gibson & Co. deposited in bank account of Extension Co., 8/6/45 to 1/22/46) on the ground that said exhibit is incompetent, irrelevant, and immaterial at this time to prove any allegation set forth in any count of indictment as against defendant Allen, and no proper foundation has been laid.

Point No. 17

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 13 (check from E. J. Gibson & Co. to Pilot Co. May 20, 1946 for $40,000) on ground that there is no connection shown as between this exhibit and anything material or relevant as it relates to counts of indictment concerning defendant Allen.

Point No. 18

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 31 (check of E. J. Gibson & Co. to James E. Gyde, May 21, 1946) and Plaintiff's Exhibit No. 31a (check E. J. Gibson & Co. to James E. Gyde, May 23, 1946) on the ground that no connection shown as between this exhibit and anything material or relevant as it relates to counts of indictment concerning defendant Allen; that the testimony of the witness Gyde did not connect up in any way these two exhibits with defendant Allen, but he specifically stated that what transaction he had was with Keane, that the statements were made by Keane, that the checks or money or whatever was concerned was handled by Keane, and that at this time there is no proper foundation laid to prove any count of the charges laid in the indictment against defendant Allen and the exhibits are incompetent, irrelevant, and immaterial.

Point No. 19

The court erred in admitting in evidence, over

objection of defendant, Plaintiff's Exhibit No. 77 (register sheets, Samuels Hotel for August 1945) on ground that same is not properly identified and is incompetent, irrelevant and immaterial to prove or tend to prove by impeachment or otherwise any issue in this case.

Point No. 20

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 78 (reference book of Samuels Hotel) on the same ground stated in Point No. 19.

Point No. 21

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 2 (checks of Lavigne & Co. deposited in bank account of Extension Co. 8/4/45 to 2/13/46) and Plaintiff's Exhibit No. 12 (checks of Lavigne & Co. deposited in bank account of Pilot Co., 5/23/46 to 6/27/46) on ground they are incompetent, irrelevant and immaterial, not proving or tending to prove any issue in this case as made out in any count of indictment as against defendant Allen, no proper foundation laid for their introduction, no connection shown at all between them and anything alleged in indictment as to defendant Allen.

Point No. 22

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 21 (letters to Lavigne & Co. transmitting stock cer-

tificates in Pilot Co.) on same grounds stated in Point No. 21.

Point No. 23

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 11 (two checks, 6/5/46 and 6/11/46, from Ben Redfield deposited in account of Pilot Co.) on same grounds stated in Point No. 21.

Point No. 24

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 20 (letter to Ben Redfield transmitting stock certificates in Pilot Co.) on same grounds stated in Point No. 21.

Point No. 25

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 3 (checks of Pennaluna & Co. deposited in bank account of Extension, 7/19/45 to 2/21/46) and Plaintiff's Exhibit No. 10 (checks of Pennaluna & Co. deposited in bank account of Pilot, 5/23/46 to 7/22/46) on ground they are incompetent, irrelevant, and immaterial, do not serve in any way to connect defendant Allen with any allegation or charge laid in any count of indictment, no proper foundation laid at this time, and no showing of any privity to defendant Allen thus far testified.

Point No. 26

The court erred in admitting in evidence, over

objection of defendant, Plaintiff's Exhibit No. 83 (copy of annual statement of Extension Co. filed with Director of Licenses, State of Washington), Plaintiff's Exhibit No. 83a (letter of Elmer Johnston to Extension Co., April 29, 1946, re filing statement), and Plaintiff's Exhibit No. 87 (letter of Johnston to Extension Co., January 11, 1946) on ground no proper foundation yet laid to connect these exhibits in any way with defendant Allen; they are incompetent, irrelevant, and immaterial; the letter, so far as defendant Allen is concerned, is hearsay, and mere fact that "CC" appears upon one is no proof, and there has been none, of any receipt of letter, or copy thereof, by defendant Allen to in any way charge him at this time.

Point No. 27

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 30 (two checks to Gyde signed by Keane May 22, 1946, and May 27, 1946); Plaintiff's Exhibit No. 33 (check to Cincinnati Co. from Keane May 1, 1946); Plaintiff's Exhibit No. 36 (deposit slip May 22, 1946, F. C. Keane); Plaintiff's Exhibit No. 37 (deposit slip May 22, 1946, Pilot Co.); Plaintiff's Exhibit No. 38 (deposit slip May 22, 1946, Coeur d'Alene Consolidated) and Plaintiff's Exhibit No. 39 (escrow agreement between Coeur d'Alene Mines and Coeur d'Alene Consolidated May 23, 1946, and cashier's check of same date to Coeur d'Alene Mines) on ground that each exhibit is incompetent, irrelevant,

and immaterial, no proper foundation yet laid from testimony of this or any witness within the counts of the indictment as alleged as against defendant Allen.

Point No. 28

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 4 (deposit slips for credit to Extension account); Plaintiff's Exhibit No. 5 (check stubs of Extension Co.); Plaintiff's Exhibit No. 6 (checks drawn by Extension Co., 6/23/45 to 3/13/47), and Plaintiff's Exhibit No. 7 (bank statements Extension Co., July 1945 to March 1947, incl.) on ground that proper foundation not laid, incompetent, irrelevant and immaterial to show any proof of allegations of counts of indictment as against defendant Allen; there is no showing that he was privy to any of the records indicated or had access thereto.

Point No. 29

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 5a (check stubs for checks Nos. 8 and 9 of Extension Co.) on ground that it is incompetent, immaterial and irrelevant to prove any issue as laid in any count of indictment as relating to defendant Allen, no proper foundation has yet been laid, including all of the testimony and the testimony of this witness; the indication of the exhibit and the testimony does not show the defendant Allen privy with anything sought to be proved here, likewise it appears from

the exhibit that the handwriting of penciled notation as to No. 8 as it appears on the exhibit there, $10,000, on No. 9, $5,000, is obviously different as to both the $10,000 and the initials "J. A. A.", yet the testimony has been to the effect that both were executed simultaneously or within a reasonable time after the occurrence of the event, whatever it was, and that the same, so far as defendant Allen is concerned, is mere hearsay and inadmissible to prove any point.

Point No. 30

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 9a (bank deposit slips, account Montana Leasing and Lexington, June 4, 1945, to December 23, 1946) on ground that the exhibit is incompetent, irrelevant, and immaterial, a proper foundation has not been laid, there is nothing in the exhibit that goes to prove any count or charge as alleged and laid in the indictment against defendant Allen.

Point No. 31

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 14 (bank deposit slips account Pilot Co. May 22, 1946, to Feb. 26, 1947), Plaintiff's Exhibit No. 15 (checks on account of Pilot Co. from May 31, 1946 to Feb. 18, 1947), Plaintiff's Exhibit No. 16 (check stubs account Pilot Co. from June 3, 1946, to Feb. 18, 1947) and Plaintiff's Exhibit No. 17 (bank statements account Pilot Co., May 1946 to Feb. 1947) on

ground that each and every one of these exhibits are incompetent, irrelevant and immaterial, do not go to prove any issues made out in any account of the indictment as against defendant Allen, and no proper foundation has been laid at this time.

Point No. 32

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 8-c-1 (check for $59.99 Montana Leasing to Kent and Rusch, 8/7/45) and Plaintiff's Exhibit No. 8-c-2 (check $200 Montana Leasing to Inland Empire Racing Association 8/7/45) on ground they are incompetent, irrelevant and immaterial, do not go to prove any issue in this case, no proper foundation laid and same serve no useful purpose other than an accumulation of documents which serve only to confuse jury and to avoid the issues made in each count in the indictment against defendant Allen.

Point No. 33

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 34 (deposit slip Delaware Mines Aug. 7, 1945), Plaintiff's Exhibit No. 35 (deposit slip Montana Leasing same date), Plaintiff's Exhibits Nos. 41, 41a, and 41b (checks Delaware Mines to Montana Leasing, $3,000; to Callahan Consolidated, $6,000; to W. H. Hanson, $1,000, same date), and Plaintiff's Exhibit No. 45 (check to Delaware Mines from Callahan Consolidated June 16, 1945, for $6,000 and voucher) on ground they are incompetent, irrelevant, and im-

material to prove any issue in this case as laid in the indictment against defendant Allen; no proper foundation laid, and introduction of these exhibits would serve no purpose other than confusion and speculation as to intent and meaning of exhibits; there have been no connections with counts of indictment shown against defendant Allen.

Point No. 34

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 40 (bank ledger of Delaware Mines with respect to entries since June 1, 1945) on ground it is incompetent, irrelevant and immaterial, it does not go to prove any count or allegation as laid in the indictment against defendant Allen and is in no way relevant to this case.

Point No. 35

The court erred in sustaining an objection of plaintiff's counsel to the question asked the witness, defendant Keane, by defendant's counsel: "Q. Do you know what the purpose of the embellishment was at that time?" referring to statements made by defendant Keane's counsel to secure from the court the acceptance of his plea of nolo contendere to the indictment to the effect that from the early part of 1940 and continuing into 1947 Keane was not attending to his practice of law, that he was using liquor excessively and at various times was not able to intelligently and in some instances to at all discuss any matter with any degree of continuity or

reason, after Keane had admitted that his counsel's statements may have been embellished somewhat, and in refusing to permit the said Keane to answer the question.

Point No. 36

The court erred in admitting in evidence, over objection of defendant, for purpose of showing that as early as 1944 witness Keane was contending there was a partnership between him and Allen, Plaintiff's Exhibit No. 93 (partnership tax return of Keane and Allen for 1943) on ground that no proper foundation had been laid, it was incompetent, irrelevant and immaterial to prove any issue as made against defendant Allen, and does not support nor prove any testimony so far adduced by Keane to effect that defendants Keane and Allen were operating a partnership under the name of Montana Leasing Company, and so far as foundation has been laid by Keane, it is pure hearsay so far as defendant Allen is concerned.

Point No. 37

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 44 (Callahan Consolidated deposit slip of August 7, 1945) on ground no proper foundation laid to connect defendant Allen with this exhibit by the testimony of either witness Keane or witness McLean; the same will lead the jury to conjecture and speculation; pure hearsay as to defendant Allen and it is incompetent, irrelevant and immaterial.

Point No. 38

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 19 (letters to E. J. Gibson & Co. transmitting stock certificates of Pilot Co. on ground the exhibit is incompetent, irrelevant and immaterial, no proper foundation laid, the responsibility of defendant Allen and his connection with this exhibit has not been shown; as to defendant Allen the exhibit is hearsay; no conspiracy established and exhibit leaves to jury to surmise and speculate in respect to its competency and effect.

Point No. 39

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 86 (letter of Johnston to Keane May 8, 1946) and Plaintiff's Exhibit No. 88 (letter of Johnston to Keane March 11, 1946) on ground that no proper foundation has yet been laid to connect them in any way with defendant Allen and they are incompetent, irrelevant and immaterial; that the letters so far as defendant Allen is concerned are pure hearsay and no proof that the letters, or copy thereof, were received by defendant Allen so as to in any way charge him at this time.

Point No. 40

The court erred in admitting in evidence, for better understanding by jury of testimony of witness Halin, over objection of defendant, Plaintiff's Ex-

hibit 96 (letter 6/9/49 Preston & Raef to J. T. Halin re disposal of his stock in 1945 in Extension Co.) on ground that same is immaterial, incompetent and irrelevant.

Point No. 41

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 98 (five checks to Allen from Standard Securities Co. 7/25/47 to 1/15/48), Plaintiff's Exhibit No. 99 (account of J. A. Allen with Standard Securities Co.), Plaintiff's Exhibit No. 97 (In-and-Out ledger of Standard Securities Co. on Extension Co.) and Plaintiff's Exhibit No. 100 (In-and-Out ledger of Standard Securities Co. on Pilot Co.) on ground that all of said exhibits are incompetent, irrelevant and immaterial as they refer to defendant Allen and do not go to prove any issue in this case; that they indicate that any transaction had was at the end of July, 1947, and have no connection with any issue in this case, and not binding on defendant Allen as to any issue.

Point No. 42

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 101 (five personal checks from Sandberg to Allen, 8/11/47 to 10/9/47) on ground that said exhibit is incompetent, irrelevant and immaterial to prove any issue in indictment as laid against defendant Allen, no proper foundation or connection shown as to these transactions with any count laid in indictment as charged against defendant Allen.

Point No. 43

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 50a (stock certificates in Extension Co. endorsed by Johnston) on ground it is incompetent, irrelevant and immaterial, evidence indicates no proper foundation or identity to prove any issue laid in indictment as against defendant Allen.

Point No. 44

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 104 (confirmation of sales by Hogle & Co. at Butte, Montana, of Extension Co. stock, account of J. A. Allen) and Plaintiff's Exhibit No. 105 (check of $6,872.95 of Hogle & Co. mailed to J. A. Allen Dec. 3, 1945) on ground the exhibits are incompetent, irrelevant, and immaterial to prove any issue in this case; it is not joined up, and no proper foundation has been laid; and the signature on the check was afterwards proved by appellant's testimony to have been forged by Keane.

Point No. 45

The court erred in overruling the objection of defendant's counsel to the question asked the witness Denney by plaintiff's counsel: "Q. Now, at how many times during the period covered by Plaintiff's 119 for identification did you discover that deposits were made at the times there were overdrafts in the bank?" on the ground that it calls for the conclusion of the witness and for the further reason that the

government proved by the witness Keane that where the overdrafts appeared on the record, in truth and in fact they were not overdrafts on account of arrangements made with the bank, that they were just merely in the nature of loans, and in permitting the witness to answer: "A. There were twenty deposits made out of Lucky Friday Extension funds and Pilot funds when there were overdrafts in the Montana Leasing bank account."

Point No. 46

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 120 (schedule of checks signed by J. A. Allen on Montana Leasing Co.), on ground that same is incompetent, irrelevant and immaterial for any purpose in this case as it does not prove or tend to prove a diversion of funds from either of the companies and it is immaterial what disposition occurred to those funds after the same were diverted, objections to the sources from which schedule was prepared being reserved.

Point No. 47

The court erred in overruling and denying the motion of defendant, made at the close of plaintiff's case and after counsel for plaintiff announced that plaintiff rested, to strike from the evidence in this cause all exhibits identified and admitted in evidence or identified or admitted in evidence pertaining to and relating to any transactions which said exhibits tend to prove and establish transpiring and occurring or alleged to have transpired or occurred subse-

quent to December 26, 1946, as well as all testimony relating to matters and things alleged to have transpired or occurred or which said testimony tends to prove transpired or occurred subsequent to December 26, 1946, and heretofore objected to by counsel for defendant on the following grounds, to wit:

First, that the evidence affirmatively shows and discloses that subsequent to said December 26, 1946, as appears from plaintiff's evidence, and particularly from evidence of government's witness Francis Clayton Keane, no conspiracy existed or could have existed between this defendant and said defendant Francis Clayton Keane, or between this defendant and the defendant Joseph Valentine Grismer, or between any two or more of said three defendants, and that the evidence in behalf of plaintiff affirmatively discloses and shows that said defendant Joseph Valentine Grismer was at no time a party to or a participant in the alleged conspiracy set forth in the indictment; that said evidence is incompetent for any purpose in the absence of affirmative proof on the part of plaintiff that at any time subsequent to December 26, 1946, the conspiracy alleged in the indictment was still in existence and it appearing from the evidence that defendant James Anthony Allen and defendant Francis Clayton Keane at no times subsequent to December 26, 1946, were on friendly relations or did conspire or scheme together to do any act unlawful or otherwise, and

Secondly, because it affirmatively appears from

testimony adduced from witnesses who have been called and testified on behalf of the government that said Joseph Valentine Grismer could not be and was not a party to any conspiracy whatsoever at the time of the inception of any conspiracy as alleged in the indictment against this defendant Allan and said Francis Clayton Keane and Joseph Valentine Grismer, and therefore could not conspire with or be a party to the conspiracy as alleged in said indictment with said defendant Allen after Dec. 26, 1946.

Point No. 48

The court erred in overruling and denying the motion of defendant, made at the close of evidence and testimony on behalf of plaintiff and after counsel for plaintiff announced that plaintiff had rested and had completed its case in chief, to have the court order the entry of a judgment of acquittal of all offenses of any kind or nature as charged, alleged and laid in each and every one of the counts in said indictment against said defendant (omitting herefrom all counts on which defendant Allen was acquitted) on the ground that plaintiff has wholly and completely failed to prove and establish beyond a reasonable doubt all the material facts and allegations alleged in Count 7 of the indictment to support any charge of crime alleged therein, and that as to Count 7 of the indictment, the testimony of the accomplice, defendant Francis Clayton Keane, fails to establish any conspiracy as charged in the indictment, if credible, and in any event that the character of said witness is such under the evidence

that his testimony is wholly insufficient and incredible to establish a conspiracy as alleged in count 7 or to connect this defendant therewith.

Point No. 49

The court erred in admitting in evidence, on cross-examination of witness Lakes, over objection of defendant, Plaintiff's Exhibit No. 8-m-1 (check to Lakes June 7, 1946, for $400 signed Lexington Company by Allen) on ground that it is incompetent, irrelevant, and immaterial to prove anything, so far as said witness is concerned, of any association with defendant Allen as brought out on direct examination and improper cross-examination as not being gone into on direct examination.

Point No. 50

The court erred in admitting in evidence, on cross-examination of witness Lakes, over objection of defendant, Plaintiff's Exhibit 8-g-1 (check to Lakes Dec. 21, 1946 for $1,000 of Montana Leasing Co. by Allen) on ground that it is wholly outside the scope of the direct examination and not material or competent in any sense to prove any issue made in this case, a private sale of stock.

Point No. 51

The court erred in admitting in evidence, on cross-examination of witness Lakes, over objection of defendant, Plaintiff's Exhibit 8-a-1 (check to Lakes June 18, 1945, for $300 of Montana Leasing Co. by Allen) on ground that it is wholly outside

the scope of the direct examination and not material or competent in any sense to prove any issue made in this case.

Point No. 52

The court erred in admitting in evidence, on cross-examination of witness Lakes, over objection of defendant, Plaintiff's Exhibit No. 122 (three checks to Lakes from Montana Leasing Co. and Lexington Co. November and September, 1946) on ground it is incompetent, irrelevant and immaterial to prove any issue in this case and improper cross-examination.

Point No. 53

The court erred in advising the jury during the examination of the defendant's witness Emacio, that in the event the evidence, when it is all considered, convinces the jury beyond all reasonable doubt that Mr. Allen was guilty of one or more of the counts charged against him, then it will be the duty of the jury to convict Mr. Allen as to such count or counts, regardless of whether or not Mr. Allen may or may not at the same time as having been engaged in the offenses charged was in a central development program, and if the jury is convinced beyond all reasonable doubt from the evidence that Mr. Allen was guilty of one or more of the counts charged, then it will be the duty of the jury to convict Mr. Allen of such, even though the evidence may establish that the Big Friday was as much or more interested in the Extension

than Mr. Allen, and even though it may be established that the Big Friday gained a great deal more benefit than any benefit Mr. Allen obtained. However, you may listen to this testimony about the Big Friday for such assistance, if any, as it may give you in determining whether or not Mr. Allen is guilty of the offense charged, and if after you have heard all the evidence you have a reasonable doubt of Mr. Allen's guilt as to any count, it is your duty to vote not guilty as to that count, to all of which the defendant excepted as being in the nature of an instruction to the jury before the evidence is in and premature.

Point No. 54

The court erred in overruling the objection of defendant's counsel to the question asked the witness Porter: "Q. Mr. Porter, did you receive some stock in the Lucky Friday Extension Mining Company which you sold through Pennaluna and Co.?" on the ground that it is incompetent, irrelevant and immaterial, unless the question is confined to whether or not he purchased any from Mr. Allen or any other defendant, incompetent to prove any issue against defendant Allen and improper cross-examination, and in permitting the witness to answer: "A. I personally did not."

Point No. 55

The court erred in overruling the objection of defendant's counsel to the question asked the witness Porter: "Q. And what did Mr. Allen say the rea-

son was that he wanted to use your name in disposing of this stock?" on the ground that it is improper cross-examination, not within the issues in the case and not material or relevant so far as any issue made against defendant Allen is concerned, and in permitting the witness to answer: "A. He wanted to raise some money for the payroll."

Point No. 56

The court erred in admitting in evidence, over the objection of defendant, Plaintiff's Exhibit No. 123 (two checks to B. W. Porter from Pennaluna & Co. April, 1947) on the ground they are incompetent, irrelevant and immaterial to prove any issue in this case, improper cross-examination, no proper foundation laid for presentation of checks to go to prove any issue in this case, and lead the jury to conjecture.

Point No. 57

The court erred in admitting in evidence, over objection of defendant, Plaintiff's Exhibit No. 124 (2 checks to B. W. Porter from Lexington Co. 5/9/46 and 10/30/46, and one from Montana Leasing Co. by Allen 7/1/46) on the ground they are not competent to prove any issue made in this case and irrelevant.

Point No. 58

The court erred in admitting in evidence on cross-examination of witness Allen, over objection of defendant, Plaintiff's Exhibit No. 125 (15 checks from

Independence Co. to Allen in 1943 and 1944) and Plaintiff's Exhibit No. 126 (check from Independence Co. to Sherman W. Smith March 31, 1943) on the ground that they are incompetent, irrelevant and immaterial and because of the fact that objection was sustained on behalf of government made to examination of witness Denney concerning his examination at this time into Independence and his answer that what he did was merely cursory, and indicating, as they do, a movement of the government through its cross-examination to go into these same things upon which they objected and were sustained.

Point No. 59

The court erred in overruling the objection of defendant to the question asked the witness Eleanor Keane on rebuttal: "Q. And did you ever hear Mr. Allen make any statement concerning Mr. Keane, your husband, with respect to whether or not he was, Mr. Keane was his partner?" on the ground that no proper foundation laid by that question to this witness, for the purpose of impeachment, and permitting the witness to answer: "A. He's referred to him as his partner in my presence many times."

Point No. 60

The court erred in overruling and denying the motion of defendant, made at the close of the evidence and testimony on behalf of plaintiff and defendant Allen and after respective counsel for both

parties have stated to the court that each of said parties had rested and completed its case, to have the court order the entry of a judgment of acquittal of all offenses of any kind or nature as charged, alleged and laid in each and every one of the counts in said indictment against said defendant (omitting herefrom all counts on which defendant Allen was acquitted) on the ground that plaintiff has wholly and completely failed to prove and establish beyond a reasonable doubt all the material facts and allegations alleged in Count VII of the indictment to support any charge of crime alleged therein, and that as to Count VII of the indictment, the testimony of the accomplice, defendant Francis Clayton Keane, fails to establish any conspiracy as charged in the indictment, if credible, and in any event that the character of said witness is such under the evidence that his testimony is wholly insufficient and incredible to establish a conspiracy as alleged in Count VII or to connect this defendant therewith.

Point No. 61

The Court erred in instructing the jury, at the close of the testimony on behalf of plaintiff and defendant, as contained in Volume 3, pages 1195 to 1240, to which the defendant then and there objected and excepted before the jury retired to consider its verdict, in the following particulars, namely,

1. That in the giving of said charge and instructions the court used the term "investigate" in dis-

cussing the duty of the jurors to examine the exhibits, after referring to them, and without in any wise indicating to the jurors that this investigation should be taken and considered in conjunction with all other evidence in the case, including the oral testimony, and the use of the term "investigator" under the circumstances is misleading and prejudicial to the defendant and eliminates the jury's consideration of their duty in relation to these exhibits to examine them as jurors and not to investigate for the purpose of trying to find a reason to convict, as distinguished from an impartial investigation of all the facts, and the attempt of the court to later correct this portion of his instructions did not meet the objection made thereto.

2. That the instructions as to credibility of accomplice is erroneous and misleading in this, that the instruction included reference to defendant Allen and the measuring of his testimony in the same respect as other witnesses, and required express evidence of corroboration as to his evidence to render the same acceptable to the jury, whereas as a matter of law that evidence is corroborated throughout and in relation to all facts by the presumption of innocence, which has the force and effect of evidence and makes the evidence of a defendant different from that of another person which has to be corroborated, whether it is evidence that has been impeached by contradictory statements or by any other means known to law, because the evidence of the defendant is supported and corroborated sufficiently

to make it acceptable, but not binding to the jury, without further corroboration.

3. That the form in which the instructions were given tend to permit the jury to convict for aiding and abetting without participating in a conspiracy.

4. That as to the force and effect to be given in event the jury believed the defendant Allen had testified falsely in some part of his testimony requiring that evidence not found to be false must be corroborated by other evidence, whereas the same is presumed to be corroborated by the presumption of innocence.

5. That the instructions permit the jury to find the defendant guilty of a conspiracy without the testimony of Keane or Grismer, whereas and under the state of the record there is no sufficient direct evidence without the use of the testimony of Keane or Grismer to establish the elements of the conspiracy charged, and that to find the elements of that conspiracy by circumstantial evidence, the jury should have been advised that such circumstantial evidence to establish that element must be consistent with but one hypothesis or one theory, namely, guilt beyond a reasonable doubt, and cannot be consistent with innocence.

6. That the instructions in relation to the jury finding that Allen's way of keeping books was designed to conceal the state of the record is not based upon evidence, and presupposes Allen's participation in some wrongful act without first advising the jury that in order to find the defendant Allen

guilty of the failure to keep proper records of the corporation, it must be first established that he conspired with Keane or Grismer, particularly Keane in this particularity, because Keane was keeping the books, and not Allen, in the keeping of improper books.

Point No. 62

The court erred in submitting to the jury, over the objection of defendant, the form of verdict as being confusing, misleading, and likely to result in an unforeseen prejudicial verdict against the defendant, and in disregard of the request of the defendant that a verdict be submitted in the alternative on each count separately, for example, that "We the jury find the defendant James Allen guilty of Count I in the indictment.", and immediately under that paragraph "not guilty of Count I" and a like designation as to each of the counts.

Point No. 63

The court erred in refusing to give defendant's offered instruction No. 3, which is as follows:

"You are instructed that before you can find the defendant Allen guilty of any of the offenses charged in the indictment you must first find from the evidence and beyond a reasonable doubt that said defendant Allen did knowingly and with fraudulent intent devise and intend to devise the identical scheme and artifice to defraud charged in the indictment and did knowingly and fraudulently intend thereby to obtain from the purchasers of treasury stock, as elsewhere defined in these instructions,

money received from the public sale of said stock, and unless such fraudulent intent did actually exist at the time the treasury stock of said corporations, or either thereof, was offered to the public for sale, defendant Allen is not guilty of the offenses so charged, and it is your duty to acquit the defendant Allen, and in this connection you are instructed that it is not material if the funds procured by the sale of said stock were diverted for other purposes, if you find they were so diverted, if such diversion was not contemplated at the time of the offering of said stock for sale."

for that the said instruction is called for and justified by the evidence, is the law, and is not elsewhere covered by any instruction or instructions by the court.

Point No. 64

The court erred in refusing to give defendant's offered instruction No. 6, which is as follows:

"You are instructed that there is no evidence in this case from which you may legitimately infer that the defendants, in order to create an appearance of mining activity on the part of the Extension and Pilot companies, did expend a small portion of the funds belonging to said corporations on the mining properties thereof for the purpose of increasing the market value of defendants' promotion stock. To the contrary the evidence is that in excess of $100,000 was employed in legitimate mining operations, and the inference which you must draw from this evidence is that of innocence."

for that the said instruction is called for and justified by the evidence, is the law, and is not elsewhere covered by any instruction or instructions by the court.

Point No. 65

The court erred in refusing to give defendant's offered instruction No. 7, which is as follows:

"You are instructed that the Government has produced no evidence in this case that the defendant Allen has schemed and conspired to conceal from the stockholders of said Lucky Friday Extension and Pilot companies information concerning the receipts and expenditures of moneys of said corporations."

for that the said instruction is called for and justified by the evidence, is the law, and is not elsewhere covered by any instruction or instructions by the court.

Point No. 66

The court erred in refusing to give defendant's offered instruction No. 8, which is as follows:

"You are instructed that the Government has produced no evidence in this case that the defendant Allen has schemed and conspired that proper books of account of the Lucky Friday Extension and Pilot companies would not be kept and maintained."

for that the said instruction is called for and justified by the evidence, is the law, and is not elsewhere covered by any instruction or instructions by the court.

Point No. 67

The court erred in refusing to give defendant's offered instruction No. 11, which is as follows:

"You are instructed that the stock issued by the Lucky Friday Extension Mining Company and the Pilot Silver-Lead Mines, Inc., in connection with the transactions mentioned in the testimony in this case falls into three classifications: First, promotion or vendor's stock which was issued to the owners of the mining properties or contracts therefor that were to be transferred to the companies; second, attorney's stock which was stock issued for services of attorneys in incorporating and organizing said corporations, making title examinations, and passing on the legality of other matters connected with the organization of said corporations; and, third, treasury stock which was stock placed in the treasury and offered for sale to the public in accordance with SEC rules and regulations."

for that the said instruction is called for and justified by the evidence, is the law, and is not elsewhere covered by any instruction or instructions by the court.

Point No. 68

The court erred in refusing to give defendant's offered instruction No. 12, which is as follows:

"You are instructed that the defendant Allen had a right to sell promotion or vendor's stock which came into his possession at any time after one year from the date of the first public offering of stock by either the Pilot or Extension companies respec-

tively had expired, whereupon the mere sale thereof was no fraud upon the public or the purchasers thereof, and the matters and things set forth in the prospectus for the offering of treasury stock would constitute no matter upon which fraud in the sale of said promotion or vendor's stock could be based.

"And therefore you are not to consider any acts charged in the indictment as being proven by sales of promotion or vendor's stock by defendant Allen after the expiration of one year from the date of the first public offering of such stock, unless you further find by the evidence and beyond a reasonable doubt such sale was made in furtherance of an unlawful conspiracy."

for that the said instruction is called for and justified by the evidence, is the law, and is not elsewhere covered by any instruction or instructions by the court.

Point No. 69

The court erred in again instructing the jury at length as set forth in Volume 3, at pages 1269 to 1277 of this Transcript of the Record when the jury returned into court more than twenty-four hours after the case had been submitted to it and the jury had been deliberating on their verdict during said time, and asked the court if the first paragraph of Count I of the indictment was incorporated in each of the other counts of the indictment and to which the answer was simply that it was and after the jury had already been thoroughly instructed on all counts, and the jury did not indicate confusion as

to the law and the need of further instructions from the court, to the giving of which instructions at said time the defendant then and there objected and excepted on the grounds and for the reasons that said additional instructions do not in direct, simple and understandable language to a layman answer the one simple and direct question asked by the jury; that while the gist of the answer is contained in additional instructions, the answer is so concealed by divers, numerous and extensive other instructions as to elements not inquired of by the jury as to wholly conceal the answer to the question propounded by the jury, and the remaining portions of the additional instructions are not the answer to the direct question of the jury, but are in answer to a condition of mind which the court assumed the jury entertained not directly disclosed by their question, the court assuming there were two problems troubling the jury, one whether or not the defendant is charged seven times with the same offense, and the other whether or not it is necessary for the government to establish in connection with each count each and every allegation of the first paragraph of the first count, and that thereby the additional instructions given by the court tends to distract the minds of the jury from their duty as deliberators, and from the answer which they sought to have elicited, and tend to accentuate the particular matters to which the additional instructions relate, and serve only to further perplex and to confuse the jury and to re-impress upon their minds the essence of the instructions

commonly known and referred to as "plaintiff's instructions", that is, instructions usually tendered by plaintiff in a criminal case, and tend to single and point out certain matters and things to be proven which it must be assumed the jury understood, or they would have, when asked if there was further confusion, stated to the court, and that further, in an instance or two in the court's additional instructions, and in dwelling upon the essential elements to be proven in relation to the various counts, the court omitted to state in connection with each count that one or more of the objects of the scheme and the scheme itself set forth in paragraph 1 of each count of the indictment, must be proven in connection with each and every overt act committed and in connection with the indictment; that there were some defects in the instructions given by the court at the close of the case and the additional instructions are in some respects in conflict with the instructions previously given by the court; that a jury of laymen cannot possibly differentiate between those portions of the law set forth in the first set of instructions and those portions of the law as set forth in the second set of instructions to which the said second set of instructions apply and modify; that the additional instructions can do nothing but confuse the jury, are not of aid to the jury and minimize the force and effect of the first instructions requested by defendant and given by the court or given by the court of his own motion, securing to the defendant the right of proper consideration of his case by the court and of a fair

trial; that the mind of the layman, as well as the mind of a lawyer, cannot grasp a copious set of instructions as has been given by the court as necessary in these cases under the law and where the indictment contained seven different counts, and the giving of specific instructions at a later time would cause the jury to overlook the force and effect of previous instructions given, and that the defense of the defendant has been materially prejudiced by the giving of the subsequent and later instructions. In other words, the jury in this case has had submitted to it at two different times two sets of instructions which are in some respects conflicting and contradictory and have greatly confused the issues to the material prejudice of defendant and his defenses.

Point No. 70

The court erred in denying the motion of defendant for an order discharging and dismissing the jury, made after the jury had been deliberating on their verdict more than twenty-eight hours, on the ground that the jury had sufficiently deliberated upon the verdict, having come before the court, requested additional instructions, and having been given such instructions and not having reached a verdict within a reasonable time, more than twenty-eight hours having elapsed since the case was given to the jury, and a verdict of either kind, guilty or not guilty, reached by the jury after this stage will be one resulting from coercion resulting from requiring a further consideration of the case.

Point No. 71

The court erred in overruling and denying the motion of defendant, made upon return of the jury's verdict and the polling of the jury, renewing the motion of defendant for judgment of acquittal submitted to the court at the close of the government's case (Point No. 48) and at the close of all the testimony on behalf of both plaintiff and defendant Allen (Point No. 60) as to Count VII of the indictment, the defendant having been found not guilty of all other counts of the indictment.

Point No. 72

The court erred in denying the motion of the defendant that the verdict of guilty returned against him by a jury in this court on Count VII of the indictment on June 19, 1949, be arrested and that no judgment and sentence be imposed thereon for the following reasons, to wit:

1. That the offense alleged and set out in Count VII was not and has not been proved as against the defendant by any competent or legal evidence, or any evidence whatsoever;

2. That the finding of the jury that defendant herein was guilty upon Count VII was and is wholly and inherently inconsistent and wholly and completely repugnant with, and to, its finding of not guilty upon Counts I, II, III, IV, V and VI of said indictment, and that there was not and is not any legal evidence or any evidence whatsoever to support the verdict of the jury on Count VII of

the indictment other than the exact and self-same facts alleged and pleaded in detail and received in evidence in support of the other counts, namely, Counts I, II, III, IV, V and VI, which were likewise pleaded in the same exact detail in support of Count VII; that the jury in view of, and after consideration of, all of the self-same and exact facts and allegations pleaded in detail in Counts I to VI of the indictment and repeated in Count VII found the defendant not guilty upon each and every one of said Counts I to VI, inclusive, and upon the facts pleaded in support of said counts; and therefore all of said facts in Counts I to VI should be eliminated in toto when considering said Count VII; that this being done, there was, and is, no legal evidence or evidence of any kind whatsoever in fact or law to support the verdict in any manner whatsoever on Count VII; and,

3. That there was and is no evidence in view of the above, sufficient to prove, that the defendant did commit or has committed any offense against the United States of America, as to Count VII of the indictment.

Point No. 73

The court erred in denying the motion of the defendant to have the court order a verdict of not guilty as to him on Count VII of the indictment herein, or for a new trial as to Count VII, on the grounds set forth in Point 72, and the additional grounds as follows:

1. The verdict of the jury on Count VII is contrary to the evidence in this cause and the law.

2. Errors by the court in the reception and exclusion of evidence were prejudicial to the defendant.

3. The court erred in its charge and instructions to the jury.

4. That no conspiracy in view of the grounds set forth in Point No. 72 has been proved by the government and the government has failed to prove any criminal intent or either separate or joint and concerted criminal action on the part of defendant, and has failed to connect the defendant in any manner whatsoever with the crime set out in Count VII in view of and because of the grounds set forth in said Point No. 72.

Point No. 74

The court erred in submitting the case to the jury and in entering the judgment and imposing a sentence in the manner and form as the evidence is wholly insufficient to support a verdict or a judgment based thereon.

The said evidence is insufficient so far as defendant Allen is concerned in that it fails to show:

1. Any agreement, express or implied, by defendant Allen with either or both of the other two defendants to conspire or combine or confederate or agree with each other to violate the Mail Fraud statute or the National Securities Act.

2. Any wrongful or unlawful intent or purpose

on the part of defendant Allen to defraud purchasers of stocks of Extension or Pilot companies or to obtain money or property by any unlawful means whatsoever in the sale of said stocks or otherwise.

3. The evidence is insufficient to show that defendant Allen promoted or organized Extension or Pilot companies or that he caused to be issued a large portion of the stock of these corporations to himself or any one for or on his behalf or that he or any one for or on his behalf concealed or had reason to conceal his connection with said companies or the receipt by him of any part of the stock of said companies to be taken by the promoters or organizers thereof.

4. That this defendant Allen had anything to do with the issuance of large blocks of stock in said companies to the attorneys mentioned in the indictment in this case under any pretense whatever that said stock was in payment of attorney fees in order to conceal the true amount of stock issued to defendants or for any secret arrangements of any kind whatsoever.

5. That this defendant Allen had anything to do with the sale of stock in said corporations to investors or in connection therewith made any representations whatsoever as to the use of the proceeds therefrom for the exploration or development of the mining properties of said corporations.

6. That this defendant Allen had anything to do with maintaining proper or any books or records

of account or concealed any facts from the stockholders of said corporations concerning receipts or expenditures of moneys of said corporations.

7. That this defendant Allen appropriated or diverted from said corporations a large or any amount of such corporate moneys to his own use or benefit.

8. That this defendant did anything whatsoever to create an appearance of mining activity on the part of these corporations or to increase the market value of any promotion stock of said companies by spending a small portion of the funds belonging to said companies on their mining properties or to dispose of any stock belonging to him by selling it to the investing public without disclosing the appropriation or diversion of large amounts of the funds of said corporations by defendant Keane, an officer and attorney of said corporation.

9. That the defendant Allen defrauded any purchasers of stock of Extension or Pilot by any unlawful means whatsoever—

(a) As to use of net proceeds to be received from sale of Extension or Pilot stock by said corporations.

(b) As to the names of the promoters or persons in control of said corporations.

(c) As to the fact that promoters would hold their stock for investment.

(d) As to accounting safeguards which would insure proper use of corporate funds, or

(e) As to amounts of stock issued to promoters or for legal services.

10. The evidence is insufficient to show that this defendant Allen, or any person for or on his behalf committed any of the overt acts set forth in Count VII of the indictment in furtherance of any conspiracy or to effect any of the alleged objects thereof.

11. The evidence is insufficient to show a continuing conspiracy as alleged in the indictment commencing prior to June 1, 1945, and continuing to the date of the indictment so that even conceding there might have been a conspiracy, all relations between defendants Keane and Allen were terminated, according to the testimony of defendant Keane, by a quarrel between them in November 1946, by the transfer in December 1946 of the Lexington bank account by having its directors provide who could endorse checks and by the entry of defendant Grismer and others into Keane's office and the removal of Extension books therefrom, and said alleged conspiracy exhausted itself in December, 1946, and was supplanted by an alleged new conspiracy starting in December, 1946; in other words, there were two separate, disconnected, distinct and independent conspiracies, if any at all.

12. That the evidence is insufficient to show any confederacy or combination or agreement between

any of the defendants looking to a conspiracy to violate the Mail Fraud statute or the National Securities Act, as charged.

13. The evidence is insufficient to establish the crime alleged in Count VII of the indictment against this defendant Allen.

Wherefore the appellant James Anthony Allen prays that said judgment of the District Court be reversed and the action dismissed as to the defendant Allen and for such further action as may be proper in the premises.

/s/ R. MAX ETTER,
/s/ WILLIAM E. CULLEN,
/s/ J. F. EMIGH,
/s/ J. A. MURRAY,
/s/ THERRETT TOWLES,

Attorneys for Defendant and Appellant, James Anthony Allen.

Receipt of copy acknowledged.

[Endorsed]: Filed December 21, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF THE PORTIONS OF THE RECORD DESIRED TO BE PRINTED

To: Paul P. O'Brien, Clerk of the above entitled Court:

Appellant James Anthony Allen in the above entitled action hereby designates the following por-

tions of the record in said action which he desires to be printed in the Transcript of the Record on the appeal:

Indictment.

Bail Bond of Defendant Allen filed May 6, 1948.

Bail Bond of Defendant Allen filed May 9, 1949.

Motion of Defendant Allen to dismiss Count VII of Indictment.

Motion of Defendant Keane to make indictment more definite and certain.

Motion of Defendant Keane for Bill of Particulars.

Clerk's Memorandums of August 23, 1948, showing pleas of all defendants entered to indictment.

Order on Keane's motion for Bill of Particulars.

Bill of Particulars.

Statements of Attorneys Herman, Langroise, and Munter made to Court December 8, 1948, on withdrawal of plea of not guilty by defendant Keane and substitution of pleas of nolo contendere to each of seven counts of indictment, as contained in stenographic notes filed Dec. 10, 1948.

Stenographic notes of January 13, 1949, of proceedings on withdrawal of plea of not guilty of defendant Allen and substitution of plea of nolo contendere filed January 31, 1949.

Stenographic notes of March 21, 1949, on withdrawal of plea of nolo contendere by defendant Allen and substitution of plea of not guilty by defendant Allen to all counts of indictment filed March 25, 1949.

Motion of defendant Allen to strike exhibits and testimony.

Defendant Allen's Requested Instructions Nos. 1 to 16 inclusive.

Motion of Defendant Allen for judgment of acquittal at close of plaintiff's case.

Motion of defendant Allen for judgment of acquittal at close of all the testimony of plaintiff and defendant Allen.

Verdict of Jury.

Motion of Defendant Allen for judgment of acquittal or for new trial on Count VII of indictment.

Motion of defendant Allen in arrest of judgment.

Judgment of conviction of Allen on Count VII of indictment.

Bail Bond of Defendant Allen for $15,000 pending determination of appeal.

Notice of Appeal.

Original Reporter's Transcript of Evidence or Proceedings on trial of defendant Allen and Court's statements on sentencing of Allen and Keane, properly certified by the clerk, excluding closing arguments of counsel to jury and examination of jurors and excluding the following matters that are immaterial for consideration of this appeal by the appellate court as are hereinafter specifically mentioned.

Original Exhibits, unless the appellate court makes an order that they need not be printed and included in the printed Transcript of the Record on appeal.

Order permitting withdrawal and transmittal of original exhibits.

Journal Entries, including those made on August 5, 1949.

Judgment of conviction of defendant Keane.

Judgment of conviction of defendant Grismer.

Orders extending time to file Transcript of Record and docket cause in appellate court.

Designation of Record on Appeal and acknowledgment of service.

Certificate of Clerk.

The portions of the Reporter's Transcript of Evidence or Proceedings on the trial which are not considered material for consideration of this appeal by the appellate court and which need not be printed are as follows: (Refers to Page Nos. at bottom in middle of page and not at right hand corner of page.)

1. Strike Page 2 commencing with the word "Whereupon" in line 5, all of pages 3 to 14 inclusive, and page 15 down through the words "Plaintiff's opening statement" in line 20, and insert in lieu thereof: "Whereupon after the jury had been duly empaneled and sworn, and prior to the opening statement made by the prosecution, the court, at the request of counsel for defendant, ordered that the witnesses be excluded from the court room while not testifying, except the advisers for the government, Messrs. Wood and Denney. Whereupon the government counsel, Mr. Erickson, made the following opening statement."

2. Strike beginning with the words "The Court",

page 43, line 6, and ending on line 2, page 44, with the words "any witness, person, matter or thing connected with it."

3. Strike on page 44, lines 11 to 15.

4. Strike on page 88, lines 9 to 20 inclusive.

5. Strike on page 97, lines 10 to 18 inclusive.

6. Strike lines 16 to 21 inclusive, page 139.

7. Strike on page 175, beginning line 10 through rest of page, all of page 176, and on page 177 through line 11.

8. Strike on page 179, commencing with line 19 "The Court: It is 4:30 now, ladies and gentlemen" through rest of page, all of page 180, and line 1 at top of page 181 "the usual admonition".

9. Strike on page 240, beginning with line 11 and ending on line 22.

10. Strike on page 290, lines 13 to 23 inclusive.

11. Strike on page 296, lines 18 to 25 inclusive, all of pages 297, 298, 299, 300 and 301, through line 12.

12. Strike on page 336 in line 5 commencing "The jury will remember" and through line 9.

13. Strike on page 336, lines 13 to 25 inclusive and page 337, lines 1 to 5 inclusive.

14. Strike on page 337, lines 15 to 25 inclusive, all of page 338 and page 339 through line 5.

15. Strike on page 408, lines 19 to 25 inclusive, and on page 409, lines 1 to 7 inclusive.

16. Strike page 410, line 25, all of pages 411, 412, 413, 414, 415 and 416 down through line 19.

17. Strike page 457, commencing with line 18, through line 7, page 458.

18. Strike line 8 to line 12 inclusive, page 498.

19. Strike commencing line 18, page 529, rest of page, and lines 1 to 24 inclusive, page 530.

20. Strike commencing line 12 through line 24, page 532.

21. Strike on page 551, commencing with line 10 through line 15, page 552.

22. Strike on page 557, line 13 through line 3, page 558.

23. Strike on page 562, commencing with line 4 through rest of page, all of page 653 and page 564 through line 10.

24. Strike on page 592, lines 17 to 21 inclusive.

25. Strike on page 595, lines 4 to 12 inclusive.

26. Strike commencing with line 12, page 629, through rest of page, and on page 630 through line 16.

27. Strike on page 632, commencing with line 4 through the page, all of page 633, through line 21 on page 634.

28. Strike on page 697, lines 2 to 7 inclusive.

29. Strike page 697, commencing with line 15 through rest of page, all of pages 698, 699, and down through line 19, page 700.

30. Strike on page 749, lines 12 to 16 inclusive.

31. Strike on page 771, commencing with line 6 through the page, and through line 8, on page 772.

32. Strike on page 784, commencing with line 7, balance of page, through line 15 on page 785.

33. Strike on page 787, lines 9 to 21 inclusive.

34. Strike on page 790, lines 23, 24, and 25, and through line 4 on page 791.

35. Strike on page 791, commencing with line 11 through rest of page, and through line 14 on page 792.

36. Strike on page 792 commencing with line 19 through rest of page, and through line 9 on page 793.

37. Strike on page 809 commencing with line 15 to end of page, and through line 5 on page 810.

38. Strike on page 813 lines 6 to 22 inclusive.

39. Strike on page 829 commencing with line 10 through balance of page, all of pages 830, 831, 832, 833, 834, and on page 835 to and including line 19.

40. Strike on page 838, lines 13 to 25 inclusive, and on page 839, lines 1 to 12 inclusive.

41. Strike on page 842 in line 9 the words "which show sales by James A. Allen" and lines 10 through 25, and on page 843, lines 1 to 3 inclusive.

42. Strike on page 872 commencing with line 7 through balance of page, and on page 873 through line 5.

43. Strike on page 881, lines 22 to 25 inclusive, and on page 882, lines 1 to 3 inclusive.

44. Strike on page 920 in line 3 commencing with the words "The jury will keep" rest of line and all of lines 4 to 21 inclusive on said page.

45. Strike on page 929, commencing with line 14 balance of page and page 930 lines 1 through 15 inclusive.

46. Strike on page 932 lines 21 to 25 inclusive, and on page 933 lines 1 to 20 inclusive.

47. Strike on page 948 lines 1 to 7 inclusive.

48. Strike on page 950 lines 11 to 25 inclusive.

49. Strike all of page 1093 and page 1094 through line 15.

50. Strike on page 1208 line 5 commencing "Now ladies," and lines 6 to 25 inclusive on said page, and on page 1209, lines 1 to 17 inclusive.

51. Strike on page 1212 commencing with line 23 through page, and all of pages 1213, 1214, 1215, and 1216 through line 19.

52. Strike on page 1218, commencing with line

6 through page, all of pages 1219, 1220, 1221, 1222, 1223 through line 16, and lines 22 through 25 on page 1223, pages 1224, 1225 and page 1226 through line 5.

Dated at Spokane, Washington, December 16, 1949.

/s/ R. MAX ETTER,
/s/ WILLIAM E. CULLEN,
/s/ J. F. EMIGH,
/s/ J. A. MURRAY,
/s/ THERRETT TOWLES,

Attorneys for Defendant and Appellant, James Anthony Allen.

Receipt of copy acknowledged.

[Endorsed]: Filed December 21, 1949.

[Title of Court of Appeals and Cause.]

ADDITIONAL DESIGNATION OF PORTIONS OF RECORD DESIRED TO BE PRINTED

To: Paul P. O'Brien, Clerk of the above entitled court:

The United States of America, Appellee in the above entitled action, hereby designates the following additional portions of the record in said action which it desires to be printed in the transcript of the record on appeal:

1. Appellant's designation 8 commencing with

line 19 on page 179 through line 1 at the top of page 181.

2. Appellant's designation 36 commencing with line 19 on page 792 through line 9 on page 793.

3. Appellant's designation 39 commencing with line 10 on page 829 through line 19 on page 835.

4. Appellant's designation 40 commencing with line 13 on page 838 through line 12 on page 839.

5. Appellant's designation 41 commencing with line 9 on page 842 through line 3 on page 843.

6. Appellant's designation 44 commencing with line 3 on page 920 through line 21 of the same page.

7. Appellant's designation 50 commencing with line 5 on page 1208 through line 17 on page 1209.

(The foregoing designations of additional portions of record to be printed referred to by pages are the Reporter's page numbers typed on the bottom of the pages.)

Dated this 20th day of December, 1949.

/s/ HARVEY ERICKSON,
/s/ FRANK R. FREEMAN,
/s/ DONALD J. STOCKING,
Attorneys for Appellee.

[Endorsed]: Filed Dec. 23, 1949.